92-988
-No. _____

Supreme Court, U.S.
FILED
DEC 8 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

KATHLEEN LEISHMAN-DONALDSON, WILLIAM J. DiGIOVANNI and JOHN A. BECKER, Individually and in their Official Capacities as Bailiff and Deputy Bailiffs of the Shaker Heights Municipal Court,

Petitioners,

vs.

RONALD F. BALAS,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

LEO R. WARD
Counsel of Record
SMITH R. BRITTINGHAM IV
MARK P. HERRON
WARD & ASSOCIATES, A Legal Professional Association
The Dallas Building
2217 East Ninth Street
Cleveland, Ohio 44115
(216) 241-0515

NIKI Z. SCHWARTZ
ORVILLE E. STIFEL, II
GOLD, ROTATORI, SCHWARTZ and GIBBONS Co., L.P.A.
1500 Leader Building
Cleveland, Ohio 44114
(216) 696-6122

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

57 pp

QUESTION PRESENTED

Whether municipal court bailiffs, who perform a court-ordered investigation into the qualifications of an alcohol counselor appointed by the court to monitor a defendant sentenced to such counseling in a criminal proceeding, are assisting the court in its performance of a judicial function, and therefore are entitled to absolute quasi-judicial immunity from liability for acts occurring during that investigation.

LIST OF PARTIES

All parties in the Sixth Circuit Court of Appeals proceeding are listed in the caption.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

REPORTS OF OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

ARGUMENT 8

I. ABSOLUTE IMMUNITY SHOULD BE EXTENDED TO OFFICIALS INVOLVED IN A COURT-ORDERED INVESTIGATION PERFORMED IN CONNECTION WITH A CRIMINAL SENTENCE 9

II. THE SIXTH CIRCUIT OPINION SIGNIFICANTLY AND UNNECESSARILY EXTENDS THIS COURT'S DECISIONS IN *BURNS V. REED* AND *FORRESTER V. WHITE* 16

III. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER FEDERAL CIRCUIT COURTS REGARDING THE IMMUNITY OF COURT EMPLOYEES 19

IV. THIS COURT'S GUIDANCE IS REQUIRED TO SOLIDIFY THE JUDICIAL IMMUNITY DOCTRINE AS IT RELATES TO A COURT'S TREATMENT AND EVALUATION OF PRIVATE CITIZENS WHO BECOME INTEGRAL PARTS OF THE JUDICIAL PROCESS 25

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Achterhof v. Selvaggio, 886 F.2d 836 (6th Cir. 1989) .16, 17

Bradley v. Fischer, 80 U.S. (13 Wall) 335 (1872)....10, 12

Briscoe v. LaHue, 460 U.S. 325 (1983) 8

Burns v. Reed, 111 S. Ct. 1934 (1991) 10, 13, 16, 17

Butz v. Economou, 438 U.S. 478 (1978) 8, 11

City of Pepper Pike v. Weiner, Shaker Heights Municipal Court, Case No. 89-TRD-22904 2

Cleavinger v. Saxner, 474 U.S. 193 (1980)..... 8, 11, 21

Commercial Savings Bank v. Wyandot County Court of Common Pleas, 35 Ohio St. 3d 192, 519 N.E.2d 647 (1988)..... 22

Coverdell v. Department of Social and Health Services, 834 F.2d 758 (9th Cir. 1987)..... 22

Dellenbach v. Letsinger, 889 F.2d 755 (7th Cir. 1989), *cert. denied*, 494 U.S. 1085 (1990) 22

Demoran v. Witt, 781 F.2d 155 (9th Cir. 1986) 20, 21

Dorman v. Higgins, 821 F.2d 133 (2d Cir. 1987)....20, 21

Forrester v. White, 484 U.S. 219 (1988) ..... *passim*

Harlow v. Fitzgerald, 457 U.S. 800 (1982)..... 11

Henriksen v. Bentley, 644 F.2d 852 (10th Cir. 1981) 23

Hughes v. Chessner, 731 F.2d 1489 (11th Cir. 1984) 20

TABLE OF AUTHORITIES – Continued

Page

Imbler v. Pachtman, 424 U.S. 409 (1976) 8, 11

Mireles v. Waco, 112 S. Ct. 286 (1991)...8, 11, 12, 13, 15

Mitchell v. Forsyth, 472 U.S. 511 (1985) 7

Pierson v. Ray, 386 U.S. 547 (1967) 8, 10

Property Management & Investment, Inc. v. Lewis, 752 F.2d 599 (11th Cir. 1985)..... 22

Sellars v. Procunier, 641 F.2d 1295 (9th Cir.), *cert. denied*, 454 U.S. 1102 (1981).....20, 21, 22

Slotnik v. Garfinkle, 632 F.2d 163 (1st Cir. 1980)..... 23

Spaulding v. Nielsen, 599 F.2d 728 (5th Cir. 1979)..... 20

Stump v. Sparkman, 435 U.S. 349 (1978).8, 10, 11, 12, 14

Tripati v. United States Immigration Service, 784 F.2d 345 (9th Cir. 1986)..... 20

Tymiak v. Omodt, 676 F.2d 306 (8th Cir. 1982)..... 22

Valdez v. City of Denver, 878 F.2d 1285 (10th Cir. 1989).....22, 23, 24

Waits v. McGowan, 516 F.2d 203 (3rd Cir. 1975)..... 23

Williams v. Wood, 612 F.2d 982, 985 (5th Cir. 1980) 23

Yaselli v. Goff, 275 U.S. 503 (1927) (*aff'g* 12 F.2d 396 (1926)) 8

UNITED STATES CODE PROVISIONS

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331..... 2

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. §§ 1441, *et seq.* 2

42 U.S.C. § 1983 ..... 1, 20

FEDERAL COURT RULES

Fed. R. Civ. P. 12 14

Fed. R. Civ. P. 56 14

STATE CODE PROVISIONS

CAL. CIV. PROC. CODE § 128 (West Supp. 1991) 12

OHIO REV. CODE ANN. § 1901.13(A) (Page 1983 and Supp. 1991) 13

OHIO REV. CODE ANN. § 1901.21(A) (Page 1983 and Supp. 1991) 13

OHIO REV. CODE ANN. § 1901.32(A)(6) (Page 1983 and Supp. 1991) 24

OHIO REV. CODE ANN. § 1907.18(B) (Page 1983 and Supp. 1991) 13

OHIO REV. CODE ANN. § 3793.10 (Page 1992) 19

OHIO REV. CODE ANN. § 4511.99(A)(7) (Page 1990 and Supp. 1991) 19

Kathleen Leishman-Donaldson, William J. DiGiovanni, and John A. Becker, in their individual capacities, hereby petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this case.

REPORTS OF OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Appendix at 1a to 12a) is not reported. The opinion of the United States District Court for the Northern District of Ohio, denying petitioners' Motion to Dismiss, or in the Alternative for Summary Judgment, (Appendix at 13a to 19a) is not reported.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was entered on September 9, 1992. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person

> within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

Additional Ohio statutory provisions, which are somewhat lengthy, are contained in the Appendix at 20a to 22a.

STATEMENT OF THE CASE

This civil action was originally filed by the plaintiff-respondent Ronald F. Balas ("Balas") in the Court of Common Pleas for Cuyahoga County, Ohio on March 7, 1991. The complaint sought damages from The City of Shaker Heights, Ohio and three bailiffs of the Shaker Heights Municipal Court – petitioners Kathleen Leishman-Donaldson, William J. DiGiovanni and John A. Becker (hereinafter referred to collectively as "the bailiffs") – in connection with a court-ordered investigation into Balas' qualifications to serve as an alcohol counselor as part of a criminal sentence in the case of *City of Pepper Pike v. Weiner*, Shaker Heights Municipal Court, Case No. 89-TRD-22904. The bailiffs were all sued in their official and individual capacities. Because the complaint raised a federal constitutional issue, alleging that the plaintiff had been "abridged rights secured to him by the Constitution of the United States and the State of Ohio," the defendants removed the case to the United States District Court for the Northern District of Ohio pursuant to 28 U.S.C. §§ 1441, *et seq.*, and 28 U.S.C. § 1331.

Balas' claims arise out of his involvement in the sentencing of a criminal defendant, Joel Weiner, who was charged in the Shaker Heights Municipal Court with driving under the influence of alcohol. Balas was the director of an organization known as "Kids in Crisis," which purported to counsel troubled youths. Weiner and Balas were friends and associates prior to Weiner's arrest; Weiner served as chairman of Kids in Crisis' fund-raising committee. Balas had also developed a congenial relationship with the only Judge of the Shaker Heights Municipal Court, Judge Paul R. Donaldson.[1]

Apparently hoping to gain some advantage from Balas' relationship with Judge Donaldson, Weiner and his attorney convinced Balas to attend Weiner's sentencing hearing and appear on Weiner's behalf. Balas was presented to the court by Weiner's attorney as "Dr. Balas," and the court was told that "Dr. Balas" was attending the hearing despite the fact that he was scheduled to attend a meeting of the Ohio Board of Mental Retardation, of which he was said to be the chairman. Balas presented the court with a business card identifying himself as "Ronald F. Balas, Ph.D." The court sentenced Weiner to a fine and probation, and, at the suggestion of Weiner's attorney, mandated that Weiner undergo alcohol counseling with "Dr. Balas" for six months. Sentencing Weiner to seek counseling with Balas departed from Judge Donaldson's usual practice of sentencing convicted drunk drivers to attend Alcoholics Anonymous meetings.

---

[1] Judge Donaldson is married to defendant Kathleen Leishman-Donaldson. Ms. Leishman-Donaldson serves as Judge Donaldson's chief bailiff.

Subsequently, the court determined that Weiner's sentence should be reevaluated. The motive for this action is somewhat disputed. The bailiffs argue the court became aware that Balas was not actually a doctor, and in fact, was not licensed to perform alcohol counseling services. Therefore the intent of Weiner's sentence was not being carried out. Balas argues that Judge Donaldson and Ms. Leishman-Donaldson were angered by Balas' unflattering psychological diagnosis in an unrelated situation concerning Ms. Leishman-Donaldson's niece, and that Judge Donaldson and Ms. Leishman-Donaldson were merely seeking revenge on Balas. Whatever the reason, the court ordered the bailiffs to investigate Balas' qualifications and background to determine whether he was properly assigned to serve as Weiner's alcohol counselor as part of Weiner's criminal sentence.

The bailiffs performed a thorough investigation of Balas' credentials. They contacted state and local medical and psychological boards and found that Balas was not a physician, psychologist or licensed alcohol counselor, and that his counseling organization, Kids in Crisis, was not licensed to perform alcohol counseling. They contacted the Ohio Board of Mental Retardation and found that, not only was Balas not the chairman as was represented to the court during the Weiner sentencing hearing, the organization had no knowledge of Balas' existence. The bailiffs obtained documents from various public agencies, such as the Ohio Secretary of State's office and the Ohio Attorney General's office, which showed that Balas had constantly held himself out as "Dr. Ronald Balas" or "Ronald Balas, Ph.D" on publicly filed documents. They sought out his educational records which showed that

Balas did not have a graduate degree at all, and that he consistently overstated his educational achievements. They talked with local and state prosecutors who had investigated Balas in the past for possible violations of the charitable organization laws. In sum, the bailiffs' court-ordered investigation confirmed the court's fears that Balas was not legally or professionally qualified to carry out the terms of Weiner's sentence, and that the basic intent of the court's sentence would be frustrated by Balas' inability to provide Weiner with effective alcohol counseling.

The court set a hearing to resentence Weiner. The court compelled a number of private citizens, some of them Balas' friends or acquaintances, to appear at the hearing and give testimony concerning Balas' qualifications. The bailiffs personally served the witnesses with "summonses" to appear at the hearing. The court later indicated at the hearing that the summonses were the result of a clerical error and should have been subpoenas, and that none of the witnesses were being charged with any criminal offenses. The witnesses who appeared before the court answered questions from the city prosecutor regarding Balas. Weiner testified that Balas never really counseled him following the sentence, suggesting rather that Weiner "get some reading material." Following the hearing, the court revised Weiner's sentence and required Weiner to attend Alcoholics Anonymous meetings for the remaining two months of his probation, finding that the previous sentence did not include any certified alcohol counseling. As a result of the resentencing and the publicity surrounding Balas' questionable credentials, Balas was forced to resign as the director of

Kids in Crisis and claims to have suffered significant reputational damage and emotional distress.

Balas brought this case against Shaker Heights and the bailiffs approximately one year later. Balas claims that the investigation was undertaken without probable cause and maliciously, and constituted an invasion of his constitutionally protected right of privacy. Balas also claims that the bailiffs made defamatory comments to the witnesses while they were serving the subpoenas and charges the bailiffs with abuse of process, malicious prosecution, intentional interference with employment, conspiracy and infliction of emotional distress.

After removing the case to federal court, the bailiffs moved to dismiss, or in the alternative for summary judgment, on Balas' claims against them in their individual capacities. In support of their motion, the bailiffs submitted the court file in the *Weiner* case and the results of their investigation. The bailiffs argued that they investigated Balas pursuant to a court order and were gathering information to be used by the court at the sentencing stage of a criminal proceeding, thereby serving a function integral to the judicial process. Thus, the bailiffs claimed to be protected by the doctrine of absolute judicial immunity.

The district court denied the motion. The district court stated that the bailiffs would be entitled to judicial immunity if they were engaging "in a quasi-judicial function or under the direction of Judge Donaldson," but not if they were acting in "an investigative role, an administrative capacity or without authority." The district court considered the role played by the bailiffs to be a factual

issue incapable of being determined at the summary judgment stage.

Pursuant to *Mitchell v. Forsyth*, 472 U.S. 511 (1985), the bailiffs appealed the district courts' denial of the immunity motion to the Court of Appeals for the Sixth Circuit. The Sixth Circuit affirmed the district court ruling in a *per curiam* opinion, with the following analysis:

> When determining whether someone should be employed or continued as a probation officer or equivalent, or be selected to counsel or supervise a criminal defendant, the judge is not acting in a judicial capacity and the court personnel who perform that function are not acting in a quasi-judicial capacity. Most of the activity complained of in this case falls into this category. Thus, to the extent they were investigating Balas, there is no absolute immunity. However, when a judge seeks to determine whether a defendant is complying with the terms of probation, the judge is performing a judicial function. To the extent court personnel were investigating whether Weiner was complying with the terms of his probation, they were performing a quasi-judicial function. To the extent defendants were performing that function at the direction of the judge, they are entitled to quasi-judicial immunity.

Appendix at 11a to 12a. The Sixth Circuit concluded that the district court was correct to require further factual development in order to determine which, if any, of the defendants' acts were protected by absolute judicial immunity.

ARGUMENT

It is well established that judges are absolutely immune from liability in civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, or if the act is alleged to have been done maliciously or corruptly. *Mireles v. Waco*, 112 S. Ct. 286, 288 (1991); *Stump v. Sparkman*, 435 U.S. 349 (1978); *Pierson v. Ray*, 386 U.S. 547 (1967). This Court has also made it clear that others who "perform functions closely associated with the judicial process," *Cleavinger v. Saxner*, 474 U.S. 193, 200 (1980), are entitled to absolute immunity. *See Butz v. Economou*, 438 U.S. 478, 511 (1978) (federal hearing examiners, administrative law judges and agency lawyers practicing in a federal administrative hearing); *Yaselli v. Goff*, 275 U.S. 503 (1927) (*aff'g* 12 F.2d 396 (1926)) (federal prosecutors); *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976) (state prosecutors); *Briscoe v. LaHue*, 460 U.S. 325, 335 (1983) (witnesses). This Court has also noted, without negative comment, that lower courts have granted grand jurors and state parole officials absolute immunity. *See Imbler*, 424 U.S. at 423 n. 20 (noting the "almost equally venerable common-law tenet" of absolute immunity for grand jurors); *Cleavinger*, 474 U.S. at 200-201 (collecting federal appeals court decisions granting state parole officials absolute immunity).

This case presents the question of whether court bailiffs performing a court-ordered investigation into the qualifications of an alcohol counselor, previously appointed by the court to monitor a defendant as part of a criminal sentence, are performing a "function closely associated with the judicial process" such that they are entitled to absolute quasi-judicial immunity from liability

for acts occurring during the investigation. This Court has never specifically addressed whether judicial immunity extends to court officers who perform acts at the request of a judge, although several lower federal courts have held that it does. Nor has this Court specifically addressed the issue of whether a judge is performing a judicial function when he or she investigates the qualifications or effectiveness of a private citizen who becomes intertwined with the judicial process. Both of these questions are directly raised by the facts of this case, and both are sufficiently important to the future availability of the judicial or quasi-judicial immunity defense to merit this Court's attention. Even if this Court's comment were not required on these subjects, the Sixth Circuit's decision is most assuredly an uneven and detrimental addition to the body of judicial immunity case law. Its potential effect on the proper application of judicial immunity principles by future courts is an additional reason for this Court to accept this case for review.

I. ABSOLUTE IMMUNITY SHOULD BE EXTENDED TO OFFICIALS INVOLVED IN A COURT-ORDERED INVESTIGATION PERFORMED IN CONNECTION WITH A CRIMINAL SENTENCE.

The municipal court was performing a function closely associated with the judicial process when it ordered an investigation of Balas' qualifications as part of the ongoing sentencing process in the *Weiner* case. Accordingly, the bailiffs who performed the investigation at the request of the court should be entitled to absolute quasi-judicial immunity. This Court's prior decisions,

while not explicitly reaching this conclusion, anticipate its ultimate adoption as law.

Absolute judicial immunity "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." *Pierson*, 386 U.S. at 554; *Bradley v. Fischer*, 80 U.S. (13 Wall) 335, 350 (1872). Absolute judicial immunity was not abrogated by Congress in the enactment of 42 U.S.C. § 1983. *See Stump*, 435 U.S at 356; *Pierson*, 386 U.S. at 554-555. Absolute judicial immunity, like absolute prosecutorial immunity, is viewed by this Court's decisions "as necessary to protect the judicial process." *See Burns v. Reed*, 111 S. Ct. 1934, 1938 (1991).

In *Forrester v. White*, 484 U.S. 219 (1988), this Court summarized the rationale underlying absolute judicial immunity:

> The purposes served by judicial immunity from liability have been variously described. In *Bradley v. Fischer*, [80 U.S. at 348], and again in *Pierson v. Ray*, [386 U.S. at 554], the Court emphasized that the nature of the adjudicative function requires a judge frequently to disappoint some of the most intense and ungovernable desires that people can have. . . . If judges were personally liable for erroneous decisions, the resulting avalanche of suits, most of them frivolous but vexatious, would provide powerful incentives for judges to avoid rendering decisions likely to provoke such suits. . . . The resulting timidity would be hard to detect or

> control, and it would manifestly detract from independent and impartial adjudication.

Forrester, 484 U.S. at 226-227 (full citations omitted).

This Court's decisions have set forth a "functional" approach to absolute judicial immunity wherein "absolute immunity flows not from rank or title or 'location within the government' . . . but from the nature of the responsibilities of the individual official." *Cleavinger*, 474 U.S. at 201 (quoting *Butz*, 438 U.S. at 511). In *Mireles* and *Stump*, this Court set forth the standard to be applied in determining whether an act is "judicial" under the "functional" analysis:

> [W]hether an act by a judge is a "judicial" one relates to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity.

Mireles, 112 S. Ct. at 288; *Stump*, 435 U.S. at 362. *See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 810 (1982) ("the judicial, prosecutorial, and legislative functions require absolute immunity"); *Butz*, 438 U.S. at 512-513 ("adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in it should also be immune from damages"); *Imbler*, 424 U.S. at 430 (activities of state court prosecutor in deciding whether to institute charges and in role as advocate were "intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force"). *Compare Forrester*, 484 U.S. at 229 (judge acting in administrative, not judicial, capacity in making decision

to discharge court employee). Stated another way, a judge will not be deprived of liability because the action taken was in excess of his or her authority; rather the judge will only be subject to liability when he or she has acted in the "clear absence of all jurisdiction." *Stump*, 435 U.S. at 356-57 (quoting *Bradley*, 80 U.S. at 351).

Proper application of this standard requires that the particular act in question not be scrutinized in isolation, but rather in "relation to a *general function normally performed by a judge.*" *Mireles*, 112 S. Ct. at 288-89 (emphasis added). In *Mireles*, this Court held that a judge who ordered two police officers to use excessive force in securing an attorney's presence in his courtroom for court business was absolutely immune from liability. This Court recognized that although the judge's specific directive to use excessive force was not a function normally performed by a judge, "if only the particular act in question were to be scrutinized, then any mistake of a judge in excess of his authority would become a 'nonjudicial' act, because an improper or erroneous act cannot be said to be normally performed by a judge." *Mireles*, 112 S. Ct. at 288. "A judge's direction to court officers to bring a person who is in the courthouse before him is a function normally performed by a judge" *Mireles*, 112 S. Ct. at 288.[2]

---

[2] This Court noted that the judge's actions were within the broad grant of power available to California courts to "control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto." *Mireles*, 112 S. Ct. at 288 n.2 (quoting CAL. CIV. PROC. CODE § 128 (West Supp. 1991)).

This Court's decisions employing the "functional" analysis have distinguished between acts that are truly acts within the judicial process, and thus protected by absolute immunity, and administrative acts, outside the context of a judicial proceeding, that simply happen to be performed by judges. In *Forrester*, for example, this Court held that a judge was not protected from liability by absolute judicial immunity for firing a probation officer, on the basis that "the decisions at issue . . . were not themselves judicial or adjudicative." *Forrester*, 484 U.S. at 229. And in *Burns*, the Court held that a prosecutor was not protected by absolute immunity for providing legal advice to police officers regarding probable cause. "We do not believe . . . that advising the police *in the investigative phase* of a criminal case is so 'intimately associated *with the judicial phase* of the criminal process' . . . that it qualifies for absolute judicial immunity." *Burns*, 111 S. Ct. at 1943 (emphasis added, citation omitted).

On their face, the actions taken by the municipal court in this case are "intimately associated with the judicial phase of the criminal process" and were not done in "clear absence of all jurisdiction."[3] The court had

---

[3] Ohio municipal courts have a similar statutory grant of power as the California court at issue in *Mireles*. An Ohio municipal court has the power, in any action or proceeding over which it has jurisdiction, "[t]o issue process, preserve order, and punish contempts, . . . and to exercise such other powers as are necessary to give effect to the jurisdiction of the court and to enforce its judgements, orders, or decrees." *See* OHIO REV. CODE ANN. § 1901.13(A) (Page 1983 and Supp. 1991) (reproduced at Appendix 20a). *See also* OHIO REV. CODE ANN. § 1901.21(A) and § 1907.18(B) (Page 1983 and Supp. 1991) (reproduced at Appendix 20a to 21a).

sentenced a criminal defendant to a fine, probation and mandatory alcohol counseling. The court appointed the counselor who was requested *by the defendant* at the sentencing hearing to perform that counseling. The court later determined, prior to the expiration of the sentence, that the qualifications of the counselor were suspect and needed to be examined more closely.[4] An investigation was performed by court officials, at the court's behest, which confirmed the court's suspicions. Accordingly, the criminal defendant's sentence was modified. All the while the various individuals "dealt with the judge in his judicial capacity." *Stump*, 435 U.S. at 362. It is difficult to imagine a series of actions more intimately associated with the judicial phase of the criminal process.

Nonetheless, both lower courts concluded that at least some of the acts complained of were not "judicial."[5]

---

[4] There is some dispute as to the "real" motivation for the court's decision to order the investigation. However, this Court's decisions make it quite clear that the applicability of absolute judicial immunity depends on the function being performed, not the presence or absence of a good faith basis for the actions taken. Thus, this particular factual dispute is immaterial to the determination of the judicial immunity issue.

[5] Both courts also concluded that further factual development was necessary. This is simply untrue. For the purposes of Fed. R. Civ. P. 12 and 56, the rules pursuant to which the bailiffs sought dismissal, the facts are to be construed in favor of the plaintiff. Thus there is no "factual dispute." The facts are as Balas presents them, at least for purposes of this appeal. Moreover, there is no dispute that the bailiffs' investigation was performed at the request of the court (although there may be some dispute as to whether the investigation was the subject of an actual journal entry), there is no dispute that Balas' qualifications were misrepresented to the court at the *Weiner* hearing,

Each opinion suggests that the lower courts considered every individual action taken by the various court officials and evaluated whether it, taken alone, was a judicial or administrative act. For example, the Sixth Circuit concluded that "[m]ost of the activity complained of in this case falls into this category [of determining whether someone should be employed as a probation officer or selected to counsel a criminal defendant]," and is therefore administrative and not deserving of absolute immunity, while other acts were deemed deserving of judicial immunity. Appendix at 12a. This analysis runs counter to this Court's admonition in *Mireles* that one should not scrutinize merely "the particular act in question," but should consider "the particular act's relation to a general function normally performed by a judge. . . . " *Mireles*, 112 S. Ct. at 288-89. When the municipal court's actions are analyzed individually under the microscope, one can imagine at least some of the acts appear less than judicial. However, when viewed as a whole, as this Court's precedent requires, the court's actions are closely related to the quintessential judicial function of criminal sentencing and must be considered judicial functions for which absolute immunity applies.

---

and there is no dispute that Weiner's sentence was modified following the investigation. The factual disputes arise merely in the severity of the bailiffs' acts performed in the context of the investigation and the damage they allegedly caused, factors essentially irrelevant to a determination of the absolute immunity issue.

II. THE SIXTH CIRCUIT OPINION SIGNIFICANTLY AND UNNECESSARILY EXTENDS THIS COURT'S DECISIONS IN *BURNS V. REED* AND *FORRESTER V. WHITE*.

The Sixth Circuit's opinion drifts far from the guidance this Court provided in *Burns v. Reed* and *Forrester v. White* and threatens to frustrate future courts in their efforts to resolve claims involving the judicial immunity defense. Specifically, the Sixth Circuit places far too much value on the concept of "investigation," apparently emboldened by this Court's finding in *Burns* that a prosecutor's advice to the police at the investigative stage of a criminal case did not deserve absolute immunity. The lower court also mistakenly applies this Court's doctrine regarding a judge's rudimentary employment decisions, as articulated in *Forrester*, to the clearly judicial acts taken in this case.

In reaching its decision that the bailiffs' acts are not deserving of absolute immunity, the Sixth Circuit apparently concluded that an "investigation" of Balas simply cannot be judicial in nature, stating at one point that "to the extent [the bailiffs] were investigating Balas, there is no absolute immunity." Appendix at 12a. This analysis extends this Court's decision in *Burns* beyond its rational limits and creates a new rule of law that all investigations undertaken by a court (or by the court's staff at the court's direction) are administrative functions irrespective of their context.

The Sixth Circuit's fixation on the concept of an "investigation" is further evidenced by its reliance upon *Achterhof v. Selvaggio*, 886 F.2d 836 (6th Cir. 1989), decided

before this Court's decision in *Burns*, where the Sixth Circuit held that absolute immunity did not apply to a social worker who initiated a child abuse investigation. The Sixth Circuit held there that:

> despite the possibility that criminal prosecution might have resulted from Selvaggio's investigation, his decision to 'open a case' was not entitled to absolute immunity. This decision was only investigatory or administrative in nature, not prosecutorial, judicial, or otherwise intimately related to the judicial process. Selvaggio did not initiate any court action in the role of a prosecutor, nor did he sit as a judge in an adversary proceeding. His work was investigatory.

Achterhof, 886 F.2d at 830.

The Sixth Circuit's reliance on *Achterhof* in this case, where the underlying facts are not even remotely similar, is wholly inconsistent with the functional approach to absolute immunity mandated by this Court. Rather than examining the function performed by the bailiffs' investigation, the Sixth Circuit attempts to conflate all "investigations," whatever their context, into the same category of administrative acts deserving only qualified immunity.

This case is readily distinguishable from *Burns*. The investigation was not initiated in a vacuum, or in anticipation of a possible criminal prosecution; thus *Burns* does not control. The investigation undertaken was part and parcel of a criminal sentencing clearly within the jurisdiction of the municipal court. Considered within its proper context, the investigation performed by the bailiffs is still a judicial function, despite the fact that it can admittedly be categorized as an "investigation." The Sixth Circuit's

rule that all investigations are administrative acts, regardless of their place in the judicial process, should be rejected.

The Sixth Circuit also appears to rely on the principles of *Forrester* to an unwarranted degree, although *Forrester* is not directly invoked, when it states that "determining whether someone should be employed or continued as a probation officer or equivalent, or be selected to counsel or supervise a criminal defendant" is not a judicial function. Appendix at 11a to 12a. This Court in *Forrester* determined that mere employment decisions by a judge are not protected by absolute immunity. However, the Sixth Circuit's casual extension of *Forrester* from employment decisions to the selection of a person to counsel or supervise a criminal defendant is unwarranted. The Court in *Forrester* noted that, in making employment decisions, a judge is performing a function which is performed by many non-judicial public officials; the policies behind absolute judicial immunity do not apply to such acts. *Forrester*, 484 U.S. at 229. However, only a judge can decide who will be appointed to supervise or counsel a criminal defendant as part of a criminal sentence and under what circumstances that sentence will be modified. The underlying policies behind absolute immunity apply with full force to such activities.

As a practical matter, this case is quite different from *Forrester*. Balas is not a court employee and is not on the court payroll. The municipal court was not making a simple employment decision when it ordered the investigation into Balas' qualifications. Balas' qualifications were examined to determine his capability under Ohio law to serve as Weiner's alcohol counselor as part of a

valid sentence in a pending criminal proceeding.[6] This Court's teachings in *Forrester* are clearly inapplicable to this case, and the Sixth Circuit's attempt to recast the municipal court's investigation of Balas as a rudimentary employment decision undeserving of absolute judicial immunity will only serve to confuse the state of the law.

III. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER FEDERAL CIRCUIT COURTS REGARDING THE IMMUNITY OF COURT EMPLOYEES.

The Sixth Circuit's decision appears to conflict with a line of cases decided by a number of federal circuits regarding the availability of the absolute quasi-judicial immunity defense to court employees either performing judicial acts, as an arm of the judge, or ministerial acts pursuant to a court order. This Court should accept review of this case in order to resolve this conflict.

Several lower federal circuits have found that probation and parole officers, whose work is closely associated with the judicial functions of the courts and is characterized by the need for discretion in decision-making, including the conducting of investigations as a part of the judicial process, are absolutely immune from liability for

---

[6] Ohio law prohibits a court from sentencing a convicted drunk driver to alcohol counseling in lieu of a jail sentence unless the counseling program and its counselors comply with statutorily mandated minimum standards. *See* OHIO REV. CODE ANN. § 4511.99(A)(7) (Page 1990 and Supp. 1991) and OHIO REV. CODE ANN. § 3793.10 (Page 1992) (reproduced in the Appendix at 21a to 22a).

their acts. *See, e.g., Dorman v. Higgins*, 821 F.2d 133 (2d Cir. 1987) (United States probation officer entitled to absolute immunity from liability in suit alleging preparation of a false probation report); *Tripati v. United States Immigration Service*, 784 F.2d 345 (9th Cir. 1986) (United States probation officer immune from liability for alleged false statements in pretrial bond report and presentence report); *Demoran v. Witt*, 781 F.2d 155 (9th Cir. 1986) (state probation officer absolutely immune from liability for alleged preparation of false presentencing report that purportedly resulted in improperly long sentence); *Hughes v. Chessner*, 731 F.2d 1489 (11th Cir. 1984) (same); *Sellars v. Procunier*, 641 F.2d 1295 (9th Cir.), *cert. denied*, 454 U.S. 1102 (1981) (state parole officers entitled to absolute immunity); *Spaulding v. Nielsen*, 599 F.2d 728 (5th Cir. 1979) (United States probation officers absolutely immune from civil liability for alleged misconduct in investigation and preparation of presentence report).

In *Demoran*, the Ninth Circuit applied the "functional" test to state probation officers and stated:

> Probation officers preparing presentencing reports serve a function integral to the independent judicial process. Like parole board members, they act as "an arm of the sentencing judge." . . . The duty of these probation officers is to engage in impartial fact-gathering for the sentencing judge. The officer is required by law to "investigate and report to the court . . . upon the circumstances of the crime and the prior history and record of the person, which may be considered *either in aggravation or mitigation of the punishment.*" The prospect of damage liability under section 1983 would seriously erode

> the officer's ability to carry out his independent fact-finding function and thereby impair the sentencing judge's ability to carry out his judicial duties.

Demoran, 781 F.2d at 157-158 (citation omitted, emphasis in original).

In *Sellars*, cited by this Court with some degree of approval in *Cleavinger*, the Ninth Circuit also stated:

> We believe that parole board officials perform functionally comparable tasks to judges when they decide to grant, deny, or revoke parole. The daily task of both judges and parole board officials is the adjudication of specific cases or controversies. Their duty is often the same: to render impartial decisions in cases and controversies that excite strong feelings because the litigant's liberty is at stake. They face the same risk of constant unfounded suits by those disappointed by the parole board's decisions.

Sellars, 641 F.2d at 1303. This Court noted that the parole board members at issue in *Sellars* were accurately described as "an arm of the sentencing judge." *Cleavinger*, 474 U.S. at 204 (quoting *Sellars*, 641 F.2d at 1302 n. 15).

Furthermore, in *Dorman*, the Second Circuit acknowledged that "some discretion must be exercised by the [probation officer] in his decision of what to report to the court." *Dorman*, 821 F.2d at 137. The Ninth Circuit in *Demoran* also noted the procedural safeguards that surrounded the filing of a presentencing report, including review by the sentencing judge and the availability of direct appellate review and the writ of habeas corpus.

Demoran, 781 F.2d at 158. *See also Sellars*, 641 F.2d at 1303-1304.[7]

Court officials and employees have also been held absolutely immune from civil liability when they act under the explicit direction of a judge or under the command of a court decree, even when they are performing a purely ministerial task. *See, e.g., Dellenbach v. Letsinger*, 889 F.2d 755, 762-763 (7th Cir. 1989), *cert. denied*, 494 U.S. 1085 (1990) (absolute immunity attaches to court reporters who, under direction of state court judge, required criminal defendant to pay for trial transcript); *Valdez v. City of Denver*, 878 F.2d 1285 (10th Cir. 1989) (sheriff's deputies absolutely immune from liability for arresting and incarcerating trial spectator pursuant to judge's order); *Coverdell v. Department of Social and Health Services*, 834 F.2d 758 (9th Cir. 1987) (social worker absolutely immune from liability in suit arising out of worker's apprehension of child pursuant to court order); *Property Management & Investment, Inc. v. Lewis*, 752 F.2d 599 (11th Cir. 1985) (receiver of corporation protected by judicial immunity in carrying out orders of appointing judge); *Tymiak v. Omodt*, 676 F.2d 306 (8th Cir. 1982) (sheriff who

---

[7] Many of the same safeguards are available in this case. The investigation resulted in an evidentiary hearing on the record, and the witnesses were available to Weiner's counsel for cross-examination. The modification of sentence, and procedure used to effect it, could have been appealed. Moreover, if Balas truly believed the municipal court was acting on matters outside its jurisdiction, he could have sought a writ of prohibition against further action by the court. *See, e.g., Commercial Savings Bank v. Wyandot County Court of Common Pleas*, 35 Ohio St. 3d 192, 519 N.E.2d 647 (1988).

evicted plaintiff from home in compliance with court order held entitled to absolute immunity from liability); *Slotnik v. Garfinkle*, 632 F.2d 163 (1st Cir. 1980) (court clerk who filled out criminal commitment papers absolutely immune from liability when carrying out official directives of state court judge). *See also, Henriksen v. Bentley*, 644 F.2d 852, 855 (10th Cir. 1981) ("absolute immunity applies where a court clerk is acting under the command of a court decree or explicit instructions from a judge); *Williams v. Wood*, 612 F.2d 982, 985 (5th Cir. 1980) ("A clerk 'may receive immunity in his own right for the performance of a discretionary act or he may be covered by the immunity afforded the judge because he is performing a ministerial function at the direction of the judge") (quoting *Waits v. McGowan*, 516 F.2d 203, 206 (3rd Cir. 1975)).

In reaching this result, the circuits have recognized that absolute judicial immunity is a primary means of protecting the judicial process. In *Valdez*, the Tenth Circuit stated:

> absolute immunity for officials assigned to carry out a judge's order is necessary to insure that such officials can perform their function without the need to secure permanent legal counsel. A lesser degree of immunity could impair the judicial process.
>
> * * *
>
> To force officials performing ministerial acts intimately related to the judicial process to answer in court every time a litigant believes the judge acted improperly is unacceptable. Officials must not be called upon to answer for the

> legality of decisions which they are powerless to control. . . . [I]t is simply unfair to spare the judges who give orders while punishing the officers who obey them. Denying these officials absolute immunity for their acts would make them a 'lightning rod for harassing litigation aimed at judicial orders.'

Valdez, 878 F.2d at 1288 and 1289 (citation omitted).

The Sixth Circuit's decision conflicts with both these lines of cases. The bailiffs' investigation was closely associated with the judicial functions of the court and required them to perform much the same sort of investigation a probation officer would perform when considering what sentence to recommend, or the investigation a parole officer would perform when considering whether to modify a criminal defendant's sentence. Simply put, they were acting as the "arms of the sentencing judge." Despite the long line of circuit court cases which grant similar "arms" absolute judicial immunity, the Sixth Circuit's decision denies the bailiffs the appropriate level of protection.

In addition, the bailiffs performed their investigation at the request of the judge who commands them. Under Ohio law, the duty of a municipal court bailiff is to perform such duties as are prescribed by the court. *See* OHIO REV. CODE ANN. § 1901.32(A)(6) (Page 1983 and Supp. 1991) (reproduced in the Appendix at 20a). The bailiffs were duty bound to perform their investigation despite the possible repercussions. The reasoning of the court below has the practical effect of imposing potential liability upon municipal court bailiffs for doing what they are required to do by statute. The Sixth Circuit's decision

directly conflicts with other circuits who have protected similar court employees from lawsuits by invoking the absolute judicial immunity doctrine.

IV. THIS COURT'S GUIDANCE IS REQUIRED TO SOLIDIFY THE JUDICIAL IMMUNITY DOCTRINE AS IT RELATES TO A COURT'S TREATMENT AND EVALUATION OF PRIVATE CITIZENS WHO BECOME INTEGRAL PARTS OF THE JUDICIAL PROCESS.

Ultimately, the success of the judicial immunity doctrine rests on its clarity. If courts and court employees are unable to determine whether they will be subjected to vexatious lawsuits as a result of their activities because the boundaries of the "judicial" function designation are unclear, they will be more careful and circumspect than their positions of public responsibility require. If persons who feel aggrieved by the actions of a judge or a court employee do not clearly understand when the protections of the judicial immunity doctrine apply, unnecessary and burdensome lawsuits will be filed. And if reviewing courts are unable to ascertain in the early stages of litigation whether the acts of a judge or a court employee are "judicial" and hence protected by absolute immunity, these same lawsuits will continue to advanced stages, occupying the court official with the burdens of litigation rather than his or her public duties.

As this Court has noted, the scope of judicial immunity is "not perfectly well defined." *Forrester*, 484 U.S. at 226. If the Sixth Circuit's decision is any indication, that unfortunate lack of clarity is particularly troublesome when applied to a situation where a court attempts to

evaluate, through an investigation performed by its officers, whether a private citizen should be given, or should retain, an integral role in the judicial process. This is a situation which faces courts daily.

Courts, like the municipal court in the *Weiner* case, which are required by state law to sentence drunk driving defendants to sessions with a licensed counselor, must constantly reevaluate whether a given counselor, many times a private individual with no permanent connection with the court, is adequately effecting the court's sentences. Similarly, a court might be required to place a child in foster care at the conclusion of a domestic dispute or a case involving alleged sexual abuse. This may require the court or its officials to investigate whether the proposed foster environment, often a private household, is capable of providing an appropriate level of care for the aggrieved child.

These are but a few of the examples where the judicial functions of a court are inextricably intertwined with private citizens who become integral parts of the judicial process. While responsible activity by such private citizens can aid the overburdened judicial system in performing its ultimate function, irresponsible activity by private citizens who offer to aid the court frustrates the effective disposition of the individual cases involved and damages the overall public perception of the legal system as a whole. A court must be permitted to examine the qualifications and abilities of private citizens on which the court relies to perform its day-to-day judicial function.

However, if a court or its officers cannot be certain that their efforts to evaluate carefully the qualifications of private citizens who are chosen to become part of the judicial process will be protected by absolute judicial immunity, they will be deterred from vigorous activity on behalf of the system's integrity. This Court should accept this case for review in order to clarify the doctrines of absolute judicial and quasi-judicial immunity so that court officers will not be deterred by uncertainty about the scope of their legal protection.

CONCLUSION

The municipal court bailiffs' court-ordered investigation was intimately associated with the judicial phase of the criminal process. As arms of the sentencing judge, the bailiffs were engaged in a uniquely judicial function, and are entitled to the protections of absolute judicial immunity.

This case presents this Court the opportunity to clarify whether court officers who perform a court-ordered investigation in the context of the modification of a criminal sentence are performing a judicial function, and to confirm the wisdom of the many circuit court decisions which hold that court officers are entitled to absolute quasi-judicial immunity when performing acts on behalf of or at the command of the court. Accordingly, petitioners request that the Court issue a writ of certiorari to

the Sixth Circuit Court of Appeals to review its judgment in the instant case.

Respectfully submitted,

LEO R. WARD
Counsel of Record
SMITH R. BRITTINGHAM IV
MARK P. HERRON
WARD & ASSOCIATES, A Legal Professional Association
The Dallas Building
2217 East Ninth Street
Cleveland, Ohio 44115
(216) 241-0515

NIKI Z. SCHWARTZ
ORVILLE E. STIFEL, II
GOLD, ROTATORI, SCHWARTZ and GIBBONS CO., L.P.A.
1500 Leader Building
Cleveland, Ohio 44114
(216) 696-6122

Attorneys for Petitioners

APPENDIX A

NO. 91 4073

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RONALD F. BALAS,

Plaintiff-Appellee,

v.

KATHLEEN LEISHMAN-DONALDSON, WILLIAM J. DiGIOVANNI, and JOHN A. BECKER, Individually and in their official capacities as Bailiff and Deputy Bailiffs of the Shaker Heights Municipal Court,

Defendants-Appellants,

CITY OF SHAKER HEIGHTS, OHIO,

Defendant.

On Interlocutory Appeal from the United States District Court for the Northern District of Ohio.

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. *This notice is to be prominently displayed if this decision is reproduced.*

[Filed September 9, 1992]

BEFORE: KENNEDY and SILER, Circuit Judges; and JOINER, Senior District Judge.*

PER CURIAM. Defendants Kathleen Leishman-Donaldson, William DiGiovanni, and John Becker, bailiffs of the Shaker Heights Municipal Court, bring this interlocutory appeal from the district court's order denying their motions to dismiss or, in the alternative, for summary judgment. Plaintiff, Ronald F. Balas, initiated this action in state court alleging that defendants had tortiously conducted an unauthorized highly intrusive investigation of him, and violated his rights as protected by the Ohio and federal constitutions. Defendants removed the case and a motion to remand was denied. Defendants' motions for dismissal or summary judgment were premised on the argument that as municipal court bailiffs they were shielded from suit by absolute judicial immunity. The motion was denied.

Our jurisdiction is established by 28 U.S.C. § 1291 and *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985) ("denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action"). We affirm.

*** Honorable Charles W. Joiner, United States District Court for the Eastern District of Michigan, sitting by designation.**

I.

Defendant Leishman-Donaldson is chief bailiff in the court of her husband, Shaker Heights Municipal Court Judge Paul Donaldson. In December 1989, Judge Donaldson conducted a sentencing hearing in the case *City of Pepper Pike v. Joel A. Weiner*. Weiner had been convicted of driving under the influence of alcohol. Judge Donaldson's sentencing policy regarding first-time offenders such as Weiner was, among other things, to require attendance at Alcoholics Anonymous meetings. At his sentencing hearing, Weiner requested that Judge Donaldson order counselling not with Alcoholics Anonymous but with Balas, with whom Weiner had worked at a charitable organization known as "Kids in Crisis."[1] The record indicates that both Judge Donaldson and Leishman-Donaldson had come into contact with Weiner in the past and, after Weiner testified that Balas had the requisite professional licensing to conduct substance abuse counselling, Judge Donaldson honored Weiner's request.

Some weeks after this sentencing hearing, the alleged investigation of Balas was conducted. The parties offer different explanations as to the goals of the investigation and the defendants' motivation. Defendants contend that Chief Bailiff Leishman-Donaldson became aware that Balas was not licensed to conduct substance abuse counselling and that he had been fraudulently representing himself as a licensed psychologist (accepting references to

---

[1] Plaintiff had apparently set up Kids in Crisis as a non-profit center for the counselling of "at risk" youth.

himself as "doctor") at the hearing before Judge Donaldson. Therefore, defendants contend, their investigation of Balas was a properly authorized "sentencing investigation" intended to determine whether a fraud upon the municipal court had been committed. Balas, on the other hand, characterizes the investigation as motivated entirely by personal animus. Balas stated that he had been retained by Judge Donaldson and Leishman-Donaldson to evaluate one of their relatives who was experiencing some substance abuse and/or emotional difficulties. After consulting with the relative's treating psychologist, Balas informed Judge Donaldson and Leishman-Donaldson that it was his belief that the relative was a possible victim of inter-family abuse. Having made this uncomfortable diagnosis implicating a relative in wrongdoing, the investigation of Balas was, in his view, begun in order to embarrass and harass him. Some unflattering details of the investigation were revealed to the press by Judge Donaldson.

While conducting the investigation, defendants sought to verify each of the professional affiliations which Balas allegedly had claimed, and conducted personal interviews with individuals whom they believed to be acquainted with Balas. The results of the investigation were turned over to the Shaker Heights prosecuting attorney.

Following the investigation, an extraordinary examination of the individuals identified by defendants as associates or acquaintances of Balas was conducted by Judge Donaldson as part of a resentencing hearing for Weiner. Six of these individuals were summoned to appear before Judge Donaldson, and were questioned by

the prosecuting attorney. The summonses issued for these individuals were apparently signed by Leishman-Donaldson, although she had no authority to do so. Balas contends that defendants roamed the community with blank summonses, serving all individuals whom they believed to be in any way connected with Balas, and making defamatory statements about him as they went. From the bench, Judge Donaldson converted the "summonses" to subpoenas.[2] The six individuals were questioned by the prosecuting attorney. Subsequent to the resentencing hearing, Judge Donaldson filed a complaint with the Shaker Heights Police Department charging Balas with contempt and obstruction of official business. Balas was not prosecuted.

This action began when Balas filed a complaint in the Ohio Court of Common Pleas alleging seven state tort causes of action: (1) invasion of privacy, (2) abuse of process, (3) malicious prosecution, (4) defamation, (5) intentional interference with employment, (6) conspiracy, and (7) emotional distress. In detailing the invasion of privacy count Balas alleged:

> 60. Upon information and belief, plaintiff alleges that Leishman's investigation of plaintiff unlawfully intruded into his private affairs and

---

[2] The record indicates that at the time of the resentencing hearing, no affidavit or complaint had been filed against Balas and, therefore, no summonses could have been issued. Ohio Rev. Code § 2935.09. However, the record also reveals that Judge Donaldson had characterized Balas as the "target" of the resentencing hearing. Balas appeared at the resentencing hearing by filing a notice of special appearance and a motion to specify charges.

> abridged rights secured to him by the Constitution of the United States and the State of Ohio.
>
> 61. Upon information and belief, plaintiff alleges that Leishman's investigation was conducted under color of law and was manifestly outside the scope of her employment and official responsibilities.

(App. at 29). These allegations were incorporated by reference within the remaining counts of the complaint, and formed the basis of defendants' removal petition. The district court granted the petition, finding that the alleged deprivation of rights secured by the federal constitution under color of state law constituted an alleged violation of 42 U.S.C. § 1983.

Following removal of the case, defendants filed their motions for dismissal or, in the alternative, summary judgment, based on the defense of absolute judicial immunity. The district court found that dismissal was inappropriate as plaintiff had articulated facts which, if proven, would preclude the defense of absolute immunity. After reviewing the law on the availability of absolute judicial immunity, the district court found that the defense was based upon a factual determination of the nature of the function being served by defendants in conducting their investigation of plaintiff. Therefore, the court concluded that the issue could not be resolved by summary judgment.

Defendants renew their contentions that they were clothed in absolute judicia! immunity because (1) in investigating plaintiff they were acting pursuant to court order, and (2) that in conducting a court-ordered sentencing investigation they were acting as an arm of the court

and serving a function integral to the judicial process. As a threshold matter, plaintiff contends that the district court lacked subject matter jurisdiction and that this action was improperly removed, and asks for an order of remand. We first address the jurisdiction argument.

II.

In pertinent part, 28 U.S.C. § 1441 (b) provides:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties.

The general federal question statute, 28 U.S.C. § 1331, provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." A cause of action satisfies the "arising under" requirement of the statute only when plaintiff's well-pleaded complaint raises an issue of federal law. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 808 (1988), *cert. dismissed*, ___ S. Ct. ___, 60 U.S.L.W. 3447, 61 U.S.L.W. 3059 (1992); *Striff v. Mason*, 849 F.2d 240, 242 (6th Cir. 1988). In assessing the existence of a federal question, a court must look to the complaint as it existed at the time the petition for removal was filed. *Cromwell v. Equicor-Equitable HCA Corp.*, 944 F.2d 1272, 1277 (6th Cir. 1991) (citing *Pullman Co. v. Jenkins*, 305 U.S. 534 (1939)). In order for jurisdiction to be founded upon a cause of action arising under the Constitution or federal law " 'a right or immunity created by the Constitution or laws of the United States must be

an element, and an essential one, of the plaintiffs cause of action.' " *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 10-11 (1983) (quoting *Gully v. First Nat'l Bank*, 299 U.S. 109, 112 (1936)), *see also Robinson v. Michigan Consol. Gas Co.*, 918 F.2d 579, 585 (6th Cir. 1990).

We find that plaintiff's complaint, as set out in this opinion, contains allegations sufficient to confer subject matter jurisdiction upon the district court. At the time the removal petition was filed, the complaint, on its face, alleged within each state law tort count a claim that Balas' rights as guaranteed by the federal constitution had been violated by defendants while acting under color of authority vested in them by state law. Although the complaint does not specifically reference 42 U.S.C. § 1983, we can discern no other purpose for inclusion of this language than to present a cause of action based upon that statute.

Balas correctly points out that for purposes of determining the existence of a federal question the court must recognize that he is the master of his own complaint and that jurisdiction may not be sustained on a theory he has not advanced. *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 809 (1986). Yet this rule does not compel a finding of no jurisdiction in this case. We reject plaintiff's contention that the language quoted from his complaint was nothing more than "a legally superfluous reference to [his] constitutional rights." Rather, we find that plaintiff consciously alleged deprivation by a state officer of rights guaranteed him by the federal Constitution. This alleged deprivation is the very heart of this action, notwithstanding that plaintiff casts the effect of

that deprivation in terms of state tort remedies. Therefore, we conclude that the district court was vested with subject matter jurisdiction over this action such that removal was properly granted.

III.

We review *de novo* the district court's determination of defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *G.M. Eng'rs and Assoc. v. West Bloomfield Township*, 922 F.2d 328, 330 (6th Cir. 1990). We apply the same standard of review for defendants' summary judgment motion. *EEOC v. University of Detroit*, 904 F.2d 331, 334 (6th Cir. 1990). Summary judgment is only appropriate when the nonmoving party fails to establish a genuine issue of material fact on an essential element to his case and on which he would bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In making that determination, we view the evidence in the record in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). We conclude, as did the district court, that the instant case can neither be dismissed under Fed. R. Civ. P. 12(b)(6) nor disposed of by summary judgment under Fed. R. Civ. P. 56(c).

The crux of our analysis of either summary procedure is whether defendants, as bailiffs of the municipal court, were entitled to derivatively assume Judge Donaldson's absolute judicial immunity. If defendants are so entitled, then dismissal is the appropriate remedy.

Every person acting under color of state law is subjected by section 1983 to liability for the deprivation of

any other person's rights, privileges, or immunities secured by the federal Constitution. 42 U.S.C. § 1983. However, section 1983 does not abolish common law immunities. *Burns v. Reed*, ___ U.S. ___, 111 S. Ct. 1934, 1945 (1991) (Scalia, J., concurring) (quoting *Malley v. Briggs*, 475 U.S. 335, 339-40 (1986)):

> Our initial inquiry is whether an official claiming immunity under § 1983 can point to a common-law counterpart to the privilege he asserts. If "an official was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the Court next considers whether § 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions."

The question whether immunity will attach in a section 1983 action is entirely one of federal law. *Martinez v. California*, 444 U.S. 277, 284 (1980).

It is well settled that judges, in the performance of their judicial functions, are absolutely immune from civil liability. *Stump v. Sparkman*, 435 U.S. 349, 363 (1978). Whether a judge or some other official is entitled to absolute immunity in a given case turns on a "functional" analysis. *Harlow v. Fitzgerald*, 457 U.S. 800, 810-11 (1982). The touchstone for applicability of absolute judicial immunity is "performance of the function of resolving disputes between parties, or of authoritatively adjudicating private rights." *Burns*, 111 S. Ct. at 1946 (Scalia, J., concurring). Absolute judicial immunity has been only "quite sparingly" recognized, *id.* at 1939 (Opinion of the Court), and the official seeking immunity must show that such immunity is justified for the governmental function

at issue. *Hafer v. Melo*, ___ U.S. ___, 112 S. Ct. 358, 363 (1991).

Federal officers, other than judges to whom a form of judicial immunity has been found to attach (quasi-judicial immunity), include hearing officers and administrative law judges. *Butz v. Economou*, 438 U.S. 478, 513 (1978). The Court has also extended the defense to state prosecutors and state parole officers, but taken pains to point out that immunity will only cloak functions performed by such officers which are judicial in nature. *Imbler v. Pachtman*, 424 U.S. 409 (1976). While the Court found that a prosecutor is entitled to immunity for performance of advocacy functions, the Court left open the question whether such immunity should be afforded to the prosecutor in his role as administrator or investigator. *Id.* at 430-31. The Court has stated its reluctance to grant absolute immunity to those not "intimately associated with the judicial phase of the criminal process." *Id.* at 430.

Thus, we have held that absolute immunity did not shield a state social worker from section 1983 liability when that individual initiated a child abuse investigation. The decision to open an investigation – notwithstanding the possibility that the investigation could lead to criminal charges – was entirely "investigatory or administrative in nature, not prosecutorial, judicial or otherwise intimately related to the judicial process." *Achterhof v. Selvaggio*, 886 F.2d 826, 830 (6th Cir. 1989).

When determining whether someone should be employed or continued as a probation officer or equivalent, or be selected to counsel or supervise a criminal defendant, the judge is not acting in a judicial capacity

and the court personnel who perform that function are not acting in a quasi-judicial capacity. Most of the activity complained of in this case falls into this category. Thus, to the extent they were investigating Balas, there is no absolute immunity. However, when a judge seeks to determine whether a defendant is complying with the terms of probation, the judge is performing a judicial function. To the extent court personnel were investigating whether Weiner was complying with the terms of his probation, they were performing a quasi-judicial function. To the extent defendants were performing that function at the direction of the judge, they are entitled to quasi-judicial immunity. All of the same considerations that would apply to the judge apply to the probation officer. "The prospect of damage liability under section 1983 would seriously erode the officer's ability to carry out his independent fact-finding function and thereby impair the sentencing judge's ability to carry out his judicial duties." *Demoran v. Witt*, 781 F.2d 155, 157 (9th Cir. 1986) (finding absolute immunity for probation officers).

The trial court was correct in denying the motion to dismiss or for summary judgment based on the record before it, and in holding that further development of the facts would be essential to determining what, if any, parts of the alleged acts were entitled to absolute immunity.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

RONALD BALAS,

Plaintiff,

v.

KATHLEEN LEISHMAN-DONALDSON, et al.,

Defendants.

CASE NO. 1:91CV0623

Judge John M. Manos

MEMORANDUM OF OPINION

[Issued 10/16/91]

Plaintiff, Ronald Balas, filed the above-captioned case against defendants the city of Shaker Heights and three individuals[1] who serve as bailiffs for the Shaker Heights Municipal Court. Balas alleges that an investigation conducted by the bailiffs unlawfully abridged rights guaranteed to him under federal and state law. The complaint, originally filed in state court, alleges claims of invasion of privacy, abuse of process, malicious prosecution, defamation, intentional interference with employment, conspiracy, and intentional infliction of emotional distress. On

---

[1] The individual defendants, Kathleen Leishman-Donaldson, William DiGiovanni, and John Becker, are each sued in their individual and official capacities. Leishman-Donaldson is the Chief Bailiff and the wife of Shaker Heights Municipal Judge Paul Donaldson.

April 3, 1991, the defendants removed the complaint because the invasion of privacy claim charging that the defendants "unlawfully . . . abridged rights secured to him by the Constitution of the United States . . . under color of law" constitutes an alleged violation of 42 U.S.C. § 1983. Accordingly, jurisdiction in this court is appropriate pursuant to 28 U.S.C. §§ 1331, 1343. On August 23, 1991, the defendant bailiffs moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) or for summary judgment pursuant to Fed. R. Civ. P. 56 based on the defense of absolute immunity. For the following reasons, the motion is denied.

I.

The defendants argue that the court should dismiss the complaint or grant summary judgment because they conducted the investigation of Balas pursuant to the orders of Shaker Heights Municipal Judge Paul Donaldson and are therefore entitled to absolute immunity. On December 19, 1989, Balas appeared before the court at a sentencing hearing for Joel Weiner who had been found guilty of driving while intoxicated. Defendant's Motion for Summary Judgment, *Balas v. Leishman-Donaldson, et al.* Case No. 1:91CV0623 at 6 (filed Aug. 23, 1991). At this hearing, Balas represented to the court that he had a Ph.D. in psychology and that his agency was certified in alcohol counselling. *Id.* at 7. Based on these representations, Judge Donaldson permitted Balas to counsel Joel Weiner. *Id.* at 6. After Weiner was sentenced, the court ordered an investigation to verify Balas' credentials. The defendants allege that they acted appropriately in pursuing the investigation and are immune from liability.

Balas alleges that the bailiffs had no authority to conduct a sentencing investigation of him before charging him with a crime. He asserts that he was hired by Judge Donaldson and his wife Kathleen Leishman-Donaldson to counsel her sister who had a thirteen-year-old daughter soon to be released from a psychiatric institution. Complaint, *Balas v. Leishman-Donaldson, et al.* Case No. 1:91CV0623 at 4 (removed Apr. 3, 1991). Balas was also asked to find an alternative psychiatric institution for the child. Complaint at 4. The child's psychiatrist informed Balas about his suspicion that the child had been sexually abused. Complaint at 6-7. On January 4, 1990, Balas discussed this suspicion with the child's mother. Complaint at 7. After that conversation, Leishman-Donaldson initiated an investigation of Balas.[2] She scheduled a hearing[3] for which she issued a criminal summons to anyone she could locate who knew him. Complaint at 12. Balas further alleges that during the course of the investigation, she disseminated defamatory information about him to members of the community and the press. Complaint at 12-13.

Balas argues that absolute immunity cannot attach to the bailiffs' acts because they acted pursuant to Leishman-Donaldson's direction, independent of any court

---

[2] The first incident of the investigation allegedly occurred on January 9, 1990 when Leishman-Donaldson contacted Orville Theodore McCormac, an attorney and psychologist who was asked whether Balas was authorized to sign health care provider forms. Complaint at 7.

[3] The hearing was scheduled for March 6, 1990. Complaint at 11.

order, and outside the scope of their statutory authority.[4] He alleges that the bailiffs illegally usurped judicial powers and that their purpose was not to discover facts about him, but to destroy his reputation in retaliation for informing Leishman-Donaldson's sister about suspected sexual abuse of her daughter. He seeks to prove that the investigation was not conducted for any legitimate fact-finding purpose, but was a personal vendetta to "distort facts and disseminate rumors, innuendos, hearsay, half-truths and lies." Plaintiff's Brief in Opposition to Motion of Defendant Bailiffs to Dismiss or in the Alternative for Summary Judgment, *Balas v. Leishman-Donaldson, et al.* Case No. 1:91CV0623 at 33 (filed Sept. 16, 1991).

II.

Section 1983 subjects every person acting under color of state law to liability for depriving any other person of rights, privileges, or immunities secured by the United

---

[4] Balas cites O.R.C. §§ 1901.32, 311.07 to support his argument that the bailiffs had no authority to act as an independent investigatory arm of the municipal court. O.R.C. § 1901.32(A)(6) provides in part:

> The bailiff and deputy bailiffs shall perform for the court services similar to those performed by the sheriff for the court of common pleas, and shall perform any other duties that are requested by rule of court.

O.R.C. § 311.07 provides in part:

> A sheriff or deputy sheriff of a county may participate, as the director of an organized crime task force . . . or as a member of the investigatory staff of such a task force, in an investigation of organized criminal activity in any county or counties in this state. . . .

States Constitution and federal laws. 42 U.S.C. § 1983. Despite the broad language of this statute, the Supreme Court has consistently held that section 1983 does not abolish common law immunities. *Burns v. Reed*, ___ U.S. ___, 111 S. Ct. 1934, 1938 (1991). However, the Court has been "quite sparing" in recognizing absolute immunity. *Id.* at 1939.

Whether immunity attaches in a Section 1983 action is a question of federal law. See *Wood v. Strickland*, 420 U.S. 308 (1975). This is so even if the suit was originally filed in state court. *Martinez v. California*, 444 U.S. 277, 285, n. 8 (1980).

Under federal law, judges are absolutely immune from suits seeking monetary damages for judicial acts. *Stump v. Sparkman*, 435 U.S. 349 (1978). The absolute immunity of a judge also protects judicial clerks for acts which are judicial in nature or are conducted pursuant to the orders of a judge. *Morrison v. Jones*, 607 F.2d 1269 (9th Cir. 1979), *cert. denied*, 445 U.S. 962 (1980); *Waits v. McGowan*, 516 F.2d 203, 206 (3rd Cir. 1975); *Shipley v. First Fed. Sav. & Loan Assn.*, 619 F. Supp. 421 (D.Del. 1985), *aff'd*, 877 F.2d 57 (3rd Cir. 1989); *DeFerro v. Coco*, 719 F.Supp. 379 (E.D.Pa. 1989). When a lower federal officer exercises judgment in a manner comparable to the function of a judge, the officer is afforded "quasi-judicial" absolute immunity. *Imbler v. Pachtman*, 424 U.S. 409, 424, n. 20 (1976). Absolute immunity does not, however, protect federal officers when they are acting in an investigative or administrative capacity. *Id.* at 431.

In order to establish entitlement to absolute immunity, defendants "bear the burden of showing that such

immunity is justified for the function in question. The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Burns v. Reed*, ___ U.S. ___, 111 S. Ct. 1934, 1939 (1991).

Whether immunity attaches to the pendent state law claims is a question of state law. *See Willitzer v. McCloud*, 453 N.E.2d 693 (Ohio 1983). The Supreme Court of Ohio indicated that in order to protect the integrity of the judicial process, "judges, counsel, parties, and witnesses are absolutely immune from civil suits for defamatory remarks made during and relevant to judicial proceedings." *Id.* at 695. Although judges and quasi-judicial officers are entitled to absolute immunity, this protection "does not extend to . . . investigative or administrative functions." *Id.* at 695 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976)).

III.

In considering a motion to dismiss, the court must interpret the facts in the light most favorable to the plaintiff in order to determine whether any set of facts would entitle him to relief. *Meador v. Cabinet for Human Resources*, 902 F.2d 474 (6th Cir. 1990). Balas articulates facts which, if proven, would preclude the defense of absolute immunity. Therefore, the motion to dismiss is denied.

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that

the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). If the bailiffs acted in a quasi-judicial function or under direction of Judge Donaldson, they would be entitled to absolute immunity. This protection would not apply if they acted in an investigative role, an administrative capacity or without authority. Whether the bailiffs acted in a manner which would entitle them to absolute immunity is a question of fact which is not appropriate for disposition on summary judgment. Accordingly, the motion is denied.

IT IS SO ORDERED.

JOHN M. MANOS
UNITED STATES DISTRICT
JUDGE

APPENDIX C

OHIO STATUTORY PROVISIONS INVOLVED

OHIO REV. CODE ANN. § 1901.13 (Page 1983 and Supp. 1991) provides, in pertinent part:

> In any action or proceeding of which a municpal court has jurisdiction, the court or any judge thereof has power:
>
> (A) To issue process, preserve order, and punish contempts, . . . and to exercise such other powers as are necessary to give effect to the jurisdiction of the court and to enforce its judgments, orders, or decrees; . . .

OHIO REV. CODE ANN. § 1901.21(A) (Page 1983 and Supp. 1991) provides, in pertinent part:

> (A) In a criminal case or proceeding, the practice, procedure, and mode of bringing and conducting prosecutions for offenses [in municipal courts] shall be as provided in the criminal rules, and the power of the court in relation to the prosecution is the same as the power that is conferred upon county courts.

OHIO REV. CODE ANN. § 1901.32 (Page 1983 and Supp. 1991) provides in pertinent part:

> (A) The bailiffs and deputy bailiffs of a municipal court shall be provided for, and their duties are as follows:
>
> (6) The bailiff and deputy bailiffs shall perform for the court services similar to those performed by the sheriff for the court of common pleas, and shall perform any other duties that are requested by rule of court.

OHIO REV. CODE ANN. § 1907.18(B) (Page 1983 and Supp. 1991) provides:

> (B) County court judges may punish contempts, and exercise powers necessary to give effect to the jurisdiction of the court and to enforce its judgments, orders, and decrees, as provided in this chapter or, in the absence of a provision in this chapter, in a manner authorized by the Revised Code or common law for the judges of the courts of common pleas.

OHIO REV. CODE ANN. § 3793.10 (Page 1992) provides, in pertinent part:

> A drivers' intervention program may be used as an alternative to a term of imprisonment for an offender sentenced pursuant to division (A)(1) of section 4511.99 of the Revised Code [prohibiting driving under the influence of alcohol or drugs], if it is certified by the director of alcohol and drug addiction services pursuant to this section. . . .
>
> . . . The rules [establishing minimum standards for approved programs] shall include, but are not limited to, standards governing program course hours and content, qualifications of program personnel, methods of identifying and testing participants to isolate participants with alcohol and drug abuse problems, referral of such persons to alcohol and drug addiction programs, the prompt notification of courts by program operators of the completion of the programs by persons required by courts to attend them, and record keeping, including methods of tracking participants for a reasonable time after they have left the program.

OHIO REV. CODE ANN. § 4511.99(A)(7) (Page 1990 and Supp. 1991) provides:

> (7) No court shall sentence an offender to an alcohol treatment program . . . unless the treatment program complies with the minimum standards adopted pursuant to Chapter 3793 of the Revised Code by the director of alcohol and drug addiction services.

Supreme Court, U.S.
FILED
FEB 16 1993
OFFICE OF THE CLERK

No. 92-988

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

KATHLEEN LEISHMAN-DONALDSON, WILLIAM J. DiGIOVANNI and JOHN A. BECKER, individually and in their Official Capacities as Bailiff and Deputy Bailiffs of the Shaker Heights Municipal Court,

Petitioners,

vs.

RONALD F. BALAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM K. REDMOND
Counsel of Record
William K. Redmond Co., L.P.A.
17259 Chillicothe Rd.
Dogwood Farm, Box R
Chagrin Falls, OH 44023
(216) 543-5979
Attorney for Respondent

QUESTIONS PRESENTED

1. Should this Court review the decision of the court of appeals which held that the trial court was correct in denying the motion to dismiss or for summary judgment based on the record before it, and in holding that further development of the facts would be essential to determining what, if any, parts of the alleged conduct were entitled to absolute immunity?

2. Whether overriding considerations of public policy warrant the extension of absolute immunity to municipal court bailiffs who violate clearly established law and engage in a personally motivated campaign of tortious misconduct against a private citizen if the campaign is conducted under the auspices of a "court ordered" sentencing investigation, despite the fact that there is no "court order" and that the target of the investigation is not a defendant in any criminal action?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES ii

STATEMENT 1

REASONS FOR DENYING THE PETITION 17

I. THE FACTUAL SITUATION PRESENTED IS SO IDIOSYNCRATIC AND ANOMALOUS THAT IT DOES NOT WARRANT REVIEW BY THE COURT 17

II. THE SIXTH CIRCUIT'S OPINION IS NOT IN CONFLICT WITH OTHER CIRCUIT COURTS OF APPEALS 18

III. THE SIXTH CIRCUIT DID NOT DEPART FROM ESTABLISHED PRECEDENT AND THE OPINION IS CONSONANT WITH THE LAW 20

CONCLUSION 23

TABLE OF AUTHORITIES

Cases: **Page:**

Burns v. Reed,
500 U.S. ___, 111 S.Ct. 1934 (1991) 21

City of Pepper Pike v. Joel A. Weiner,
Shaker Heights Municipal Court
Case No. 89 TRD 22904 ..... 4, 10, 14

Demoran v. Witt,
781 F. 2d 155 (9th Cir. 1986) 19

Dorman v. Higgins,
821 F. 2d 133 (2nd Cir. 1987) 18, 19

Donaldson v. Donaldson,
Cuyahoga County Court of Common Pleas
Case No. 8715562 9

Forrester v. White,
484 U.S. 219 (1988) 20

Hafer v. Melo,
___U.S. ___, 112 S.Ct. 358 (1991) 20

Imbler v. Pachtman,
424 U.S. 409 (1976) 20

Malley v. Briggs,
475 U.S. 335 (1986) 20

McNutt v. General Motors Acceptance Corp.
298 U.S. 178 (1936) 16

Mitchell v. Forsyth,
472 U.S. 511 (1985) 16, 21

Siegert v. Gilley,
___ U.S. ___, 111 S.Ct. 1789 (1991) 16

State of Ohio v. Kathlenn Leishman-Donaldson,
Cuyahoga County Court of Common Pleas
Case No. CR 274556 8

State of Ohio v. Paul R. Donaldson,
Cuyahoga County Court of Common Pleas
Case No. CR 288632 8

Statutes: **Page:**

42 U.S.C. § 1983 ..... 16, 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-988

KATHLEEN LEISHMAN-DONALDSON, WILLIAM J. DiGIOVANNI and JOHN A. BECKER, individually and in their Official Capacities as Bailiff and Deputy Bailiffs of the Shaker Heights Municipal Court,

Petitioners,

vs.

RONALD F. BALAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION

Respondent Ronald F. Balas respectfully asks this Court to deny the petition for writ of certiorari for the reasons stated below.

STATEMENT

The statement of the case provided by the petitioners misstates and omits material facts which have a bearing on the question of what issues would properly be before the Court if certiorari were granted. Accordingly, a detailed statement of the facts as established in the record on appeal is appropriate and necessary to an understanding of the Sixth Circuit's decision.

For more than twenty years prior to the incidents complained of, plaintiff-respondent Ronald F. Balas ("Ron Balas" or "Balas") was actively involved on a daily basis with the counseling of youths who were "at risk" of becoming status offenders for truancy, delinquency, crime, alcohol and drug abuse (R. 39: Exhibit 3-A, Affidavit of Frederick J. Stauffer; Exhibit 3-C, Affidavit of Ronald F. Balas).

In 1979 Balas founded Kids in Crisis ("K.I.C."), a charitable non-profit organization dedicated to helping "at risk" youth. Balas worked at K.I.C. as a counselor continuously until 1990 when he was forced to resign (R. 39: Exhibit 3-C, Affidavit of Ronald F. Balas).

Petitioner Leishman ("Leishman") at all times relevant, was the chief bailiff of the Shaker Heights Municipal Court ("Shaker Court"). Leishman's husband, Judge Donaldson was at all times relevant the only judge of the Shaker Court.

Leishman first contacted Balas on December 8, 1989 when she telephoned K.I.C. and requested a meeting to discuss behavioral problems which her sister was experiencing with her 13 year old daughter (Leishman's niece). Later that day Balas and Dr. Iris Marshall, a co-worker at K.I.C., met with Leishman and Judge Donaldson to discuss Leishman's niece who was in institutional treatment for chemical dependency (R. 40: Exhibit 11-A. Affidavit of Ronald F. Balas;[1] R. 39: Exhibit 13-E, Affidavit of Iris Ann Marshall, Ph.D.). Leishman explained to Balas that she wanted to find alternative placement for her niece

---

[1] R. 40: Plaintiff's Exhibits 11-A through 11-D were filed with the district court under seal, on plaintiff's motion, in order to protect the identity and privacy of the minor child.

because the insurance money had run out and the niece was due to be discharged. Balas agreed to help find alternative placement and to counsel Leishman's sister (R. 40: Exhibit 11-A, Affidavit of Ronald F. Balas). In apparent gratitude for Balas' help, Leishman told Balas in front of Judge Donaldson that "they would take care of the ticket"; referring to a speeding ticket which Balas had received from the Shaker Heights Police on November 28, 1989 and for which he had been summoned to appear in the Shaker Court on December 16, 1989 (R. 39: Exhibit 10-D, Affidavit of Ronald F. Balas).

Balas and Iris Marshall, Ph.D. counseled Leishman's sister on December 12, 19, and 29, 1989 and again on January 4, 1990 (R. 39: Exhibit 13-E, Affidavit of Iris Ann Marshall, Ph.D.).

From December 8, 1989 until at least January 4, 1990 Leishman and Judge Donaldson were very enthusiastic about Balas' efforts on behalf of Leishman's sister and niece. Leishman and Donaldson offered to help raise money for K.I.C. and Leishman gave Balas several Fraternal Order of Police "courtesy cards" in which she listed herself as "Chief Bailiff/Deputy Sheriff."[2]

On December 19, 1989 Ron Balas appeared as a character witness before the Shaker Court at the request of Joel Weiner, who was to be sentenced by Judge Donaldson on a guilty plea

---

[2] *See*, R. 39: Exhibits: 10-A, Affidavit of Ronald F. Balas; 10-B, Letter of 12/28/89 from Leishman to Balas; 10-C, "Sample" solicitation letter prepared by Leishman; 10-E, Affidavit of Ronald F. Balas; and 10-F, F.O.P. cards issued to Balas by Leishman.

to a charge of driving a motor vehicle while intoxicated. At the time of the sentencing Judge Donaldson asked Ron Balas whether he would be willing to monitor Weiner and to provide him with some counseling regarding alcohol (R. 33: at pp. 24-25[3]). Balas agreed and told Judge Donaldson that either he or "one of our professionals can provide it at the agency" (*Id.*, at p. 25). Contrary to the petitioners insinuation that Judge Donaldson released Mr. Weiner into the custody of only Ron Balas, the sentencing transcript reveals that Judge Donaldson actually released Weiner "in the custody of Dr. Balas, Kids in Crisis, and/or his staff to monitor you" (*Id.*, at p. 28).[4] Subsequently, Weiner was referred by Balas to Dr. Rita Politzer, a licensed psychologist and Board member of K.I.C. for supervision of his probation (R. 41: Exhibit 20, Transcript of Proceedings on March 6, 1990, *City of Pepper Pike v. Joel A. Weiner*, Testimony of Dr. Rita Politzer, Tr. at pp. 32-38).[5]

---

[3] The sentencing transcript in the case of *City of Pepper Pike v. Joel A. Weiner*, Shaker Heights Municipal Court Case No. 89 TRD 22904, is contained in R. 33 at pp. 19-30.

[4] It is noteworthy that the handwritten journal entry of the Shaker Court regarding Mr. Weiner's probation has had a portion of the notation scratched out so as to make it look like Balas was the only one responsible for Weiner's probation supervision. *See*, R. 39: Exhibit 16, Certified Copies of Journal Entries in the case of *City of Pepper Pike v. Joel A. Weiner*, Shaker Heights Municipal Court Case No. 89 TRD 22904.

[5] There is absolutely no evidence in the record to support the petitioners' assertion that "sentencing Weiner to seek counseling with Balas departed from Judge Donaldson's usual practice of sentencing convicted drunk drivers to Alcoholics Anonymous meetings." (Petition at p. 3). To the contrary, the only evidence in the record on appeal indicates that Judge Donaldson frequently referred convicted defendants to volunteer probation supervisors with no formal training. *See*, R. 39: Exhibit 18, Friends of the Court, published by the Shaker Court.

On January 2, 1990 Ron Balas telephoned the psychiatrist in the chemical dependency unit at the institution where Leishman's niece was a resident in order to discuss alternative placement for the child. During the conversation the psychiatrist informed Balas that the behavioral symptoms of Leishman's niece included sexual acting out and that the child's art therapy suggested sexual imposition (R. 40: Exhibit 11-A, Affidavit of Ronald F. Balas; *Accord.*, Exhibit 11-B, Affidavit of Orville Theodore McCormac).

On January 4, 1990 Balas counseled Leishman's sister and brought up the possibility, based on observations of her daughter's psychiatrist, that the child was a victim of sexual molestation (*R. 40:* Exhibit 11-A, Affidavit of Ronald F. Balas).

From this point forward Leishman's conduct toward Balas became increasingly bizarre and malicious; ultimately culminating in a full-fledged campaign of intimidation, retaliation, and retribution to defame and embarrass Balas and to ruin his reputation and standing among friends, associates, coworkers, colleagues, and employers.

Between January 9th and 19th, 1990, Leishman telephoned various professional associates of Balas. In one instance Leishman falsely insinuated to a licensed psychologist that Balas was forging his name on forms provided to insurance carriers for billing purposes (R. 39: Exhibit 13-C, Affidavit of Orville Theodore McCormac). In other instances Leishman telephoned persons associated with K.I.C. and others and informed them, *inter alia.*, that Balas was a fraud and was "practicing psychiatry without a license"; that Balas was "under investigation"; and that she would be seeking a grand jury indictment against Balas (*See*, R. 1: Amended Complaint, ¶¶ 22-25).

As a result of Leishman's verbal accusations against Balas, the Executive Board of K.I.C. determined that Balas should take a leave of absence pending resolution of her charges (*Id.*, Amended Complaint at ¶ 26).

On January 22, 1990 Balas retained attorney William K. Redmond ("Redmond") relative to the public accusations which Leishman was making against him (*Id.*, Amended Complaint at ¶ 27).

Based on information that Leishman held herself out as a deputy sheriff and regularly carried a firearm, Redmond made formal written inquiry on January 31, 1990 to various law enforcement agencies and certifying authorities concerning Leishman's law enforcement credentials, or lack thereof (*Id.*, Amended Complaint at ¶ 28).

Although not addressed in the opinions of either the district court or the court of appeals, the Amended Complaint (R. 1) and the record on appeal clearly establish a causal nexus between Redmond's representation of Balas and the severity of the retribution which Leishman ultimately exacted of Balas. In this regard the record on appeal clearly evidences the fact that Leishman became enormously concerned about the fact that Redmond was asking questions about her. As it turned out Leishman and Judge Donaldson had much to fear as they had a great deal to hide.

Leishman first contacted Redmond by telephone on February 6, 1990 and demanded to know why Redmond was asking questions about her and who he represented (R. 39: Exhibit 12-D, Affidavit of Attorney William K. Redmond). Leishman specifically wanted to know whether Redmond represented Squire Lovelace (*Id.*).

That Leishman was concerned that Redmond represented Squire Lovelace is significant. Squire Lovelace was a former employee of Aluminum Smelting & Refining Co. who was granted a disability by the State of Ohio, Bureau of Workers Compensation for an electrical shock injury which he received at work in June of 1989 (R. 40: Exhibit 11-C, Affidavit of Squire Lovelace). On December 20, 1989 Lovelace was confronted by Leishman in the lobby of his doctor's office. Leishman, wearing a pistol and a cap with police insignia told Lovelace that he would be going to jail (*Id.*). On December 29. 1989 Lovelace was called to the offices of Aluminum Smelting & Refining Co. where he was again confronted by Leishman. At this meeting Leishman introduced herself and stated that she had been with the police department for 12 years and that she now had her own detective agency (*Id.*). Leishman then showed Lovelace a video taped surveillance of him and told him that he had defrauded the company and that if it were up to her he would be going to jail. The President of the company then attempted to persuade Mr. Lovelace to sign some papers. The President, Mr. Barnett, told Lovelace that the company did not want to prosecute him for fraud and that they would pay him $1,000.00 if he would sign the paper. Lovelace refused (*Id.*).

As it turns out, Leishman did in fact own her own private investigation company, Search Concepts, Inc. Unfortunately, neither Leishman nor Search Concepts, Inc. was licensed by the State of Ohio to operate a private investigation company (*See*, R. 39: Exhibit 8-A, Certificate of Good Standing for Search Concepts, Inc., an Ohio corporation; Exhibit 8-B, Articles of Incorporation for Search Concepts, Inc.; Exhibit 9-B, Certified copy of 1990 financial disclosure statement of Judge Paul R. Donaldson ["Search Concepts, Inc. ... is my wife's wholly owned corporation out of which she does teaching and investigations."]; Exhibit 6-A, Division of Licensing certification

regarding Kathleen Leishman a.k.a. Kathleen Leishman-Donaldson; Exhibit 6-F, Division of Licensing certification regarding Search Concepts, Inc.). In Ohio it is illegal to engage in the business of private investigations unless the person or business is licensed.

More unfortunately, and quite obviously a great source of concern to Leishman was the fact that she was using Shaker Court employees on court time to conduct private investigations (*See*, R. 40: Exhibit 11-D, Affidavit of Nancy J. Johnston). Equally unfortunate is the fact that Judge Donaldson was receiving income from his wife's illegal private investigation business (*See*, R. 39: Exhibits 9-A and 9-B, certified copies of Judge Donaldson's financial disclosure statements for 1989 and 1990, respectively).[6]

Redmond's inquiries into Leishman's law enforcement credentials were an equal source of concern and aggravation to her since she had consistently misrepresented herself as a deputy sheriff despite the fact that she was not trained or

---

[6] The Court can take judicial notice of the fact that on November 21, 1991, during the pendency of the appeal, Judge Donaldson and the petitioners were indicted by the Cuyahoga County Grand Jury on numerous counts of Theft in Office in connection with Leishman's private investigation business. *State of Ohio v. Kathleen Leishman-Donaldson, et al.*, Cuyahoga County Court of Common Pleas Case No. CR 274556. On October 15, 1992 in a plea agreement with prosecutors, Leishman plead guilty to five attempted theft counts, two attempted unauthorized access to computer services, and three violations of the private investigators statute. *State of Ohio v. Kathleen Leishman-Donaldson*, Case No. CR 274556. The Cuyahoga County Prosecutor dismissed all charges against Judge Donaldson on October 15, 1992. *State of Ohio v. Paul R. Donaldson*, Case No. CR 288632.

certified as a peace officer under Ohio law and the fact that she an never been on any Sheriff's Department payroll (*See*, R. 39: Exhibit 4, Excerpts from the deposition testimony of Kathy Leishman on June 5, 1987, *Mignon Donaldson v. Paul Donaldson*, Cuyahoga County Court of Common Pleas, Case No. 8715562, at pp. 22-23; Exhibit 10-E, Affidavit of Ronald F. Balas; Exhibit 10-F, F.O.P. cards distributed by Leishman; Exhibit 5-A , Letter from Warren H. Goodwin, Chief Deputy, Lake County Sheriff's Department; Exhibit 5-B, Letter from Reid W. Chave, Director of Certification and Standards, State of Ohio Peace Officer Training Council).

Whether motivated by a fear that Redmond would discover the fact that Leishman was running an illegal private investigation business out of a court of law or that she had misrepresented herself as a deputy sheriff for years, the record on appeal clearly establishes that Leishman and/or Judge Donaldson were enormously concerned about Redmond's inquiries. Between February 6th and February 9th, 1990 Leishman: personally contacted Redmond, attorney Tyrone Reed, and K.I.C. to determine who Redmond represented; had attorney Jane Wilson contact Redmond to determine who he represented; and had attorney Anthony O. Calabreese call other attorneys with whom Redmond was associated in order to "send a communication" to Redmond that attorney Wilson was prepared to be a witness against Redmond for interfering with Leishman's business (*See*, R. 39: Exhibit 12-A, Affidavit of Attorney Tyrone Reed; Exhibit 12-B, Affidavit of Attorney Howard E. Coburn; Exhibit 12-C, Affidavit of Attorney Linda L. Bluso; Exhibit 12-D, Affidavit of Attorney William K. Redmond).

On February 9, 1990 Leishman was informed that Redmond represented Ron Balas. Leishman immediately sought

to contact Balas on his telephone pager. When Balas returned the call to the Shaker Court, Leishman told Balas that "the judge" was going to hold him in contempt and to "bring his attorney" (R. 39: Exhibit 3-C, Affidavit of Ronald F. Balas; Exhibit 12-D; Affidavit of Attorney William K. Redmond).

On February 12, 1990 Leishman sent Ron Balas a certified letter on Shaker Court stationary threatening "legal action" unless her F.O.P. cards were immediately returned (R. 39: Exhibit 10-G, letter dated 2/12/90 from Leishman to Balas).

On February 20, 1990 Judge Donaldson re-opened the case of *City of Pepper Pike v. Joel A. Weiner,* Case No. 89 TRD 22904 for a reconsideration of sentence on March 6, 1990 at 11:00 a.m. The journal entry directed that a summons[7] be issued to Ron Balas and personally served by the Bailiff's office (R. 39: Exhibit 16, Certified Copy of Journal entries, *City of Pepper Pike v. Joel A. Weiner*).

Beginning on February 22, 1990 petitioners Leishman, William J. DiGiovanni, and John A. Becker (hereinafter collectively referred to as "the bailiffs") undertook a systematic campaign of serving criminal summons to virtually anyone they could find who had any sort of association with Balas and of telling prospective "witnesses" and others incredibly outrageous and malicious lies about Ron Balas.

Specifically, from at least February 22nd through March 5, 1990 the bailiffs served criminal summons upon various

---

[7] Ohio R. Crim. P. 4 specifies that a warrant or summons be issued upon a complaint and a determination that there is probable cause to believe an offense has been committed.

friends, associates, colleagues, and co-workers of Balas which ordered these people to appear at the Shaker Court on March 6, 1990 at 11:00 a.m. **"to show cause why you should not be held in contempt of court for failing to obey an order of this court."** (*See*, R. 39: Exhibits 14-A through 14-J, Certified Copies of Summons issued by the bailiffs).

In her campaign against Balas, Leishman threatened various individuals who were perceived as being friendly and/or reluctant to testify against Balas (*See, e.g.*, R. 39: Exhibit 13-C, Affidavit of Orville Theodore McCormac; Exhibit 13-G, Affidavit of Mark W. Adamik; Exhibit 13-I, Affidavit of Raymond U. Wetzel; Exhibit 13-K, Affidavit of Helen Balas). In addition the bailiffs variously told recipients of the summons and others the following malicious lies about Balas: that this was "a case against Balas for misrepresenting himself as a psychiatrist (R. 39: Exhibit 13-A, Statement of Steven A. Fine; Exhibit 13-G, Affidavit of Mark W. Adamik); that Balas was wanted by the F.B.I. (R. 39: Exhibit 13-D, Affidavit of Laura DeRue; Exhibit 13-F, Affidavit of Shirley L. Wallace); that Balas had stolen $13,000.00 and had "gone underground"; that the police were looking for Balas; that Balas had misrepresented himself as a Doctor of Psychology; that Balas had killed a man while driving drunk; that Balas was running a Bingo game in Elyria, Ohio; that everything Balas had done had been under "false pretenses" and that Balas didn't have a black belt in karate (*Id.*).

On March 6, 1990 Ron Balas appeared with Redmond at the Shaker Court at which time a Notice of Special Appearance and a Motion to Specify the Charges was filed with the court (R. 39: Exhibit 15-A). Prior to the hearing all counsel were called into Judge Donaldson's chambers where he "converted" all the illegal summons issued by the bailiffs into subpoenas; admitted

that the summons which he ordered issued to Ron Balas was not based upon any complaint; and identified Balas as the "target" of the hearing (R. 39: Exhibit 15-B, Affidavit of Attorney James G. Corrigan).[8]

After the chambers conference the hearing went forward. The news media and various personal friends and associates of Balas had been invited to the hearing by Leishman and were in attendance. Leishman sat at the prosecutor's table.

Despite the fact that Judge Donaldson had identified Ron Balas as a "target" of the hearing, both in chambers and on the record, he excluded Balas from the court room and did not permit him to listen to any of the testimony which the prosecutor was attempting, with Leishman's assistance, to elicit against him. Redmond was not permitted to cross-examine any of the witnesses. All of the eight witnesses who were called were examined concerning their relationship to or knowledge of Ron Balas (*See*, R. 41: Transcript of Proceeding, *City of Pepper Pike v. Joel A. Weiner*, Shaker Heights Municipal Court, Case No. 89 TRD 22904).

After the hearing Leishman and/or Judge Donaldson gave a private interview to a reporter for the Cleveland Plain

---

[8] Although the petitioners strenuously urge that the issuance of the "summonses were the result of a clerical error" (Petition at p. 5), the affidavits in the record on appeal suggest otherwise. Thus when Mark W. Adamik declined Leishman's invitation to voluntarily appear at the Shaker Court to testify against Balas, Leishman became very belligerent. When Adamik told Leishman that any further contact should be directed to his lawyer, Leishman told Adamik: "We'll come to your home with the police and serve a summons since you're being a prick about this." (R. 39: Exhibit 13-G, Affidavit of Mark W. Adamik. *Compare*, Exhibit 13-C, Affidavit of Orville Theodore McCormac; Exhibit 13-H, Affidavit of Barbara Adamik).

Dealer (R. 1: Amended Complaint, at ¶ 50). The following day an article appeared about Balas in the paper entitled: Judge Suspects Youth Counselor of Fraud (*See*, R. 33 newspaper article at p.165). Shortly after the hearing of March 6, 1990 K.I.C., the organization which Balas had founded, asked for his resignation. Members of the Kiwanas Club who had been invited to the hearing also asked for Balas' resignation from that organization (R. 1: Amended Complaint, ¶¶ 52-53).

On March 9, 1990 Leishman prepared a memorandum to Judge Donaldson which summarized all of the "evidence" which she had gathered on Ron Balas. In her memorandum Leishman manufactured false accounts of witness interviews. Thus, Leishman writes: "Balas tells people he is a psychologist and counselor routinely." (R. 33: Confidential Investigation at p. 5 [Leishman Memorandum at p. 3]). In support of this contention Leishman writes: "Judge Paul Donaldson and I spoke to Ms. Laraine Canzonetta who is the Administrative Assistant and Drug Coordinator for the Orange School System since 1971...**She said she was told by Balas that he was a Doctor of Psychology and she would appear at the hearing on 3/6/90 at 11:00 a.m. and testify.**" (*Id.* at p. 10 [Leishman Memorandum at p. 8]). (Emphasis supplied.)

Indeed, Ms. Canzonetta had already appeared at the March 6th hearing. However, in contradistinction to Leishman's assertions, Ms. Canzonetta testified under oath that she did not know anything about Ron Balas' counseling, training, or educational experience (R. 41: Testimony of Laraine Canzonetta, Tr. at p. 47). More significantly, Ms. Canzonetta has reviewed the referenced portion of Leishman's memorandum and in a sworn affidavit specifically disavows the assertion that Ron Balas ever told her that he was a "Doctor of Psychology" or that she ever communicated that to Leishman or Judge Donaldson (R. 39:

Exhibit 1-A, Affidavit of Laraine Canzonetta).

Similarly, Leishman wrote of her meeting with Shirley L. Wallace as follows: "On 3/5/90 at 11:30 a.m. Judge Paul R. Donaldson, Mary Jane Gambosi and I interviewed Shirley L. Wallace at the courthouse... **She knew him (Balas) as a ddoctor** ***(sic)*** **of psycology** ***(sic)***" (R. 33 at p. 15 [Leishman memorandum at p. 13]). (Emphasis supplied.)

Mrs. Wallace sworn affidavit regarding the meeting, however, directly contradicts Leishman's assertion (R. 39: Exhibit 13-F, Affidavit of Shirley L. Wallace). Like Ms. Canzonetta, Shirley Wallace has now reviewed the referenced section of Leishman's memorandum and like Ms. Canzonetta, she too explicitly repudiates the assertions contained therein (*Id.*, Exhibit 1-B, Affidavit of Shirley L. Wallace).

Notwithstanding the fact that Leishman was willing to manufacture false accounts of witness interviews in order to "prove" that Ron Balas was practicing "psychiatry" or "psychology" without a license, the fact remains that not one of the witnesses who testified before the Shaker Court on March 6, 1990 could support the proposition that Ron Balas had ever help himself out as either a "psychiatrist" or a "psychologist" (*See*, R. 41: Transcript of Proceeding, *City of Pepper Pike v. Joel A. Weiner*).

Nevertheless, Leishman persisted in her campaign of retribution against Balas. In this regard Leishman and Judge Donaldson, in clear violation of Ohio law, forwarded copies of her 308 page "Confidential Investigation" of Ron Balas to at least the following: the Ohio Attorney General, the Shaker Heights Prosecutor, the State of Ohio Counselor and Social Worker Board, and the Internal Revenue Service (*See*, R. 33,

Confidential Investigation at pp. 1, 2, 99).

On March 23, 1990 Judge Donaldson filed a complaint with the Shaker Heights Police Department charging Ron Balas with contempt and obstruction of official business (*Id.* at 307-308).

Subsequently, the City Council of Shaker Heights retained a special prosecutor to look into Judge Donaldson's charges. Sometime after May 16, 1990, the special prosecutor determined that there was no probable cause to prosecute Balas (R. 1: Amended Complaint at ¶ 57).

The case, *sub judice*, was commenced on February 21, 1991 in the Common Pleas Court of Cuyahoga County, Ohio. The Complaint sought damages against the bailiffs in their individual and official capacities. The City of Shaker Heights was also named as a defendant. Plaintiff-respondent's causes of action against the bailiffs were predicated exclusively on the following seven state law causes of action: Invasion of Privacy,[9] Abuse of Process, Malicious Prosecution, Defamation, Intentional Interference with Employment, Conspiracy, and Emotional Distress. On March 14, plaintiff filed an Amended Complaint with the Court of Common Pleas as a matter of right.

On April 3, 1991 all defendants joined in filing a notice of removal (R. 1) with the U.S. District Court. On April 5, 1991 all defendants joined in filing a brief in support of removal (R. 5). On April 29, 1991 plaintiff filed, *inter alia*, a motion to remand (R. 16), which was subsequently denied by the district

---

[9] Plaintiff's claim for Invasion of Privacy was asserted against only Leishman.

court on August 16, 1991.

On appeal, plaintiff-respondent again raised the argument that invasion of a person's right to privacy, although cognizable under the law of the State of Ohio, is not a federally guaranteed right and cannot form the basis of a § 1983 action. In this regard, plaintiff-respondent challenged the subject matter jurisdiction of the district court charging that defendants had failed to meet their burden under *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1989) and that the district court had failed to properly address this threshold issue under the directives of *Siegert v. Gilley*, ___U.S.___, 111 S. Ct. 1789.

The Sixth Circuit Court of Appeals disagreed and held that the Amended Complaint "contains allegations sufficient to confer subject matter jurisdiction upon the district court." (Opinion at 8a.[10])

Although respondent believes the jurisdictional analysis of the court of appeals is flawed and that the removal of this case from the state court represents a cynical attempt to masquerade valid state law claims as a flawed § 1983 action in order to invoke the *Forsyth* doctrine for the sole purpose of impeding discovery and delaying trial, respondent has chosen not to raise the jurisdictional argument at this juncture.

---

[10] The opinion of the Sixth Circuit Court of Appeals is reproduced as Appendix A to the Petition for Writ of Certiorari.

REASONS FOR DENYING THE PETITION

I. THE FACTUAL SITUATION PRESENTED IS SO IDIOSYNCRATIC AND ANOMALOUS THAT IT DOES NOT WARRANT REVIEW BY THE COURT

Illegal summons have been issued; witnesses have been menaced and intimidated; defamatory charges have been made public; reports of investigatory interviews have been manufactured; illegal searches have been threatened; a 308 page KGB style *dossier* has been compiled and distributed; a Star Chamber has been convened; and then charges were brought. This notwithstanding, the bailiffs of the Shaker Court opine that they are entitled, as a matter of law, to a blanket grant of absolute immunity to all acts attributed to them because they were on "official business": acting pursuant to a "court ordered" sentencing investigation of a person who was not a defendant in a case in which there was no "court order". *Indeed.*

Given the fact that this Court has historically conferred absolute immunity on officials only in extraordinary circumstances and has denied absolute immunity to: senior aids and advisors to the President of the United States; the Attorney General of the United States in performing national security functions, members of the President's cabinet; the Governor and Adjutant General of Ohio National Guard in military decision making, it is nothing less than arrogant in the extreme for the bailiffs of the Shaker Court to claim absolute immunity for their reign of petty tyranny.

Perhaps the most compelling reason for denying the writ is that the factual situation presented is so extraordinary and bizarre that it does not warrant the attention of this Court.

Although the record indicates that it was *de riguer* for the petitioners to usurp both police and prosecutorial functions in administering their own peculiar brand of justice, one can only hope that most courts in this country have not devolved to a point where the distinction between investigative, prosecutorial and judicial functions have become so hopelessly blurred.

Even if the Court were of the opinion that the extraordinary facts of this case warranted review, it would be premature for the Court to grant review when the case is far from over, the record is incomplete because no discovery has been allowed, and the implication of the ruling below is theoretical at best.

II. The Sixth Circuit's opinion is not in conflict with other circuit courts of appeals

Petitioners attempt to create a conflict between the Sixth Circuit's decision and the decisions of several other circuits in which probation officers have been granted absolute quasi-judicial immunity. This supposed conflict is contrived, not real. In contradistinction to the present case, the cases upon which petitioners rely were concerned with the limited function of gathering information for presentation to a court. More significantly, the cases upon which petitioners so heavily rely are distinguishable from the present case by virtue of the adequacy of procedural safeguards to prevent an abuse of power. Thus, in *Dorman v. Higgins*, 821 F. 2d 133 (2nd Cir. 1987) the Second Circuit Court of Appeals held that a federal probation officer was entitled to absolute immunity from a claim that he prepared a false presentence report on a criminal defendant, noting that: "We see little danger in according federal probation officers absolute immunity for this function, for the presentence report is subject to a number of procedural safeguards designed to protect the defendant's constitutional right not to be sentenced

on the basis of information that is materially false." *Id.* at 138. In this regard the court noted, *inter alia*, that the defendant and his counsel had to be given the opportunity to review the report and that the accuracy of the controverted part of the presentence report is subject to review on appeal. Similarly, in *Demoran v. Witt*, 781 F. 2d 155 (9th Cir. 1986) the Ninth Circuit Court of Appeals extended absolute immunity to cover a California probation officer with respect to a presentence report prepared pursuant to his statutory duty. The court reasoned that the extension of absolute immunity was justified because a "plethora of procedural safeguards surround the filing of a presentence report." *Id.* at 158. These safeguards included, *inter alia*, the fact that the report was made available to the defendant and his counsel at least nine days prior to hearing and that the report became a part of the record. *Id.*

In stark contrast to the cases in *Dorman* and *Demoran* there were no procedural safeguards in place to protect Ron Balas. Ron Balas had no right or opportunity to review the results of Leishman's "Confidential Investigation" or to challenge its findings; he had no right to adduce evidence or testimony in his defense; he was even denied an opportunity to sit at the hearing; and he had no right to an appeal. But again, Ron Balas was not a defendant in the proceeding before the Shaker Court.

It must be remembered that what is at issue in this case is not the limited function of gathering information about a convicted criminal defendant for presentation to a court to assist in the determination of an appropriate sentence. Rather this case is concerned with the creation and dissemination of false and defamatory information about a private citizen to the public and to the media outside of the courtroom. Even assuming that the bailiffs had some legitimate authority to conduct an investiga-

tion of Balas as a volunteer probation supervisor, the proper performance of that function does not entail the abuse of process, the manufacture and distribution of false "evidence" or gratuitous defamation.

III. The Sixth Circuit did not depart from established precedent and the opinion is consonant with the law

For purposes of determining immunity under federal law, this Court has repeatedly emphasized that the state officer who seeks absolute exemption from personal liability bears the burden of showing that such exemption is justified by "overriding considerations of public policy." *Forester v. White*, 484 U.S. 219, 224 (1988). Under established precedent the presumption is in favor of a standard of qualified immunity which "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

In determining immunity questions under § 1983, this Court has traditionally made a "considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Imbler v. Pachtman*, 424 U.S. 409, 421 (1976). Officials seeking absolute immunity must show that such immunity is justified for the governmental function at issue. *Hafer v. Melo*, ___U.S. ___, 112 S.Ct. 358, 363 (1991).

To determine whether public policy requires that the action of particular governmental officials be immune from suit, this Court has adopted a functional approach. In this regard the Court has identified three factors which must inform an immunity analysis, these being: 1) whether an historical or common law basis exists for granting an official absolute immunity from

suit for performing a particular function; 2) whether the proper performance of the function in question poses special risks of vexatious litigation; and 3) whether sufficient safeguards exist to prevent an abuse of power. *Mitchell v. Forsyth*, 472 U.S. 511, 521-23 (1985).

In applying these principals to the bailiffs' claimed entitlement of absolute immunity, the Sixth Circuit noted that "the touchstone for applicability of absolute judicial immunity is 'performance of the function of resolving disputes between parties, or of authoritatively adjudicating private rights.' " *Burns v. Reed*, 500 U.S. ___, ___, 111 S. Ct. 1934, 1946 (Scalia, J., concurring.) (Opinion at 10a.)

In accordance with this Court's decisions, the Sixth Circuit recognized that quasi-judicial immunity has been extended to hearing officers, administrative law judges, state prosecutors, and state parole officers. However, the Sixth Circuit noted that this Court "has taken pains to point out that immunity will only cloak functions performed by such officers which are judicial in nature" (Opinion at 11a, citing *Imbler*.)

In declining to extend absolute immunity to the activities of the bailiffs without further development of the factual record, the Sixth Circuit correctly held that an employment determination -whether someone should be employed or continued as a probation officer or equivalent- is not a judicial function and that court personnel who perform that function are not acting in a quasi-judicial capacity. (Opinion at 11a-12a.) Nevertheless, the Sixth Circuit did hold open the possibility that certain of the bailiffs' activities could be entitled to quasi-judicial immunity to the extent that they were investigating whether Weiner was complying with the terms of his probation at the direction of the judge. (Opinion at 12a.) The Sixth Circuit

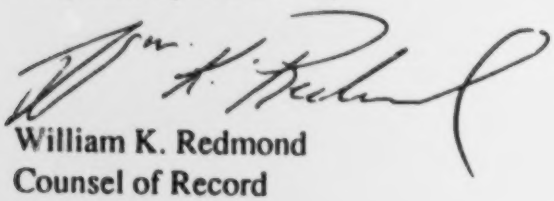
concluded that "the trial court was correct in denying the motion to dismiss or for summary judgment based on the record before it, and in holding that further development of the facts would be essential to determining what, if any, parts of the alleged acts were entitled to absolute immunity." (*Id.*)

The decision of the Sixth Circuit is sound and is consonant with the law. Given the fact that there is no journal entry in the *Weiner* case which authorized or sets forth the scope of the bailiffs' extraordinary inquisition, it is impossible, without the benefit of discovery, to determine what in fact was authorized by the judge let alone to draw the conclusion that the bailiffs' actions were *intra vires*. Clearly, there was no court order to issue phoney criminal summons because the petitioners have stated that the issuance of the summons were all clerical mistakes (Petition at p. 5). Were the bailiffs instructed to defame Balas, or merely to gather information? If in fact Judge Donaldson ordered the bailiffs to break the law, would they still be entitled to claim a derivative quasi-judicial immunity? The resolution of these questions and numerous others raised by this case is inappropriate in the abstract. Complete development of

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,



William K. Redmond
Counsel of Record

William K. Redmond Co., LPA
17259 Chillicothe Road
Dogwood Farm - Box R
Chagrin Falls, Ohio 44023
(216) 543-5979
Attorney for Respondent Ronald F. Balas

Supreme Court, U.S.
FILED
FEB 22 1993
OFFICE OF THE CLERK

No. 92-988

In The

Supreme Court of the United States

October Term, 1992

KATHLEEN LEISHMAN-DONALDSON, WILLIAM J. DiGIOVANNI and JOHN A. BECKER, Individually and in their Official Capacities as Bailiff and Deputy Bailiffs of the Shaker Heights Municipal Court,

Petitioners,

vs.

RONALD F. BALAS,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONERS' REPLY BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

LEO R. WARD
Counsel of Record
SMITH R. BRITTINGHAM IV
MARK P. HERRON
WARD & ASSOCIATES,
A LEGAL PROFESSIONAL ASSOCIATION
The Dallas Building
2217 East Ninth Street
Cleveland, Ohio 44115
(216) 241-0515

NIKI Z. SCHWARTZ
ORVILLE E. STIFEL, II
GOLD, ROTATORI, SCHWARTZ AND GIBBONS, CO., L.P.A.
1500 Leader Building
Cleveland, Ohio 44114
(216) 696-6122

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

ARGUMENT

This brief reply is intended to point out the similarities between this case and a case recently accepted for review by this Court, and to suggest that the cases be resolved simultaneously in order to avoid inconsistent rulings.

As the Petition for Certiorari discusses in more detail, this case involves the scope of the absolute quasi-judicial immunity doctrine as it applies to municipal court bailiffs who investigated the credentials of the respondent, Ronald F. Balas. Respondent had been appointed to provide alcohol counseling services to a criminal defendant as part of the defendant's sentence. Respondent alleges that the bailiffs defamed him, harassed his acquaintances and otherwise violated his constitutional and common law rights during the course of their investigation. The bailiffs claim that they are protected by the doctrine of absolute quasi-judicial immunity because they were assisting the municipal court in its exercise of a judicial function, namely the sentencing of a criminal defendant, and were performing their investigation at the court's request. The Sixth Circuit determined that at least some of the bailiffs' acts were administrative rather than judicial, and that the bailiffs were not protected by absolute quasi-judicial immunity. The question presented to this Court for review is whether the bailiffs were performing a judicial function and are therefore entitled to absolute immunity

for any acts occurring during their investigation of respondent's credentials.[1]

This Court recently accepted review of *Antoine v. Byers & Anderson, Inc.*, docketed as Case No. 91-7604. *See Antoine*, 61 U.S.L.W. 3284 (October 13, 1992). In *Antoine*, the plaintiff, a convicted criminal defendant, brought an action against the court reporter who was hired by the federal court to transcribe the proceedings during the plaintiff's criminal trial. The court reporter had failed to complete a transcript of the proceedings, and had lost a substantial portion of the notes and tapes of the proceedings, thus delaying the plaintiff's appeal of his conviction for four years. The district court and the Ninth Circuit both agreed that the court reporter was performing a judicial function in attempting (but failing) to transcribe the events during the trial, and that she was protected by absolute judicial immunity. *See generally Antoine v. Byers & Anderson, Inc.*, 950 F.2d 1471 (9th Cir. 1991). The question accepted for review by this Court in *Antoine* is whether the court of appeals erred in granting absolute, rather than qualified, immunity for the court reporter, even though her conduct was in violation of numerous court orders and statutory duties. *Antoine*, 61 U.S.L.W. 3309 (October 20, 1992).

---

[1] The bulk of the facts and arguments presented in the Respondent's Brief in Opposition deal with the bailiffs' alleged motivation, the severity of their acts and the damage they caused. All of these issues are essentially irrelevant to the central question: Were the bailiffs performing a judicial function in investigating respondent? Thus, no specific response to the Brief in Opposition is required.

Both *Antoine* and this case address the question of whether absolute judicial immunity applies to court officials other than judges who participate in the judicial process. Both cases require an analysis of whether the court officials were engaged in judicial functions. Both cases may require addressing the question of whether conduct which violates court procedures or statutes can still be considered a judicial function and protected by absolute immunity, or whether such conduct is not merely in excess of the court official's jurisdiction, but in clear absence of his or her jurisdiction. Certainly a conclusion by this Court in *Antoine* on any of these issues would have a significant impact on the bailiffs' claims to absolute immunity in this case. More importantly, a decision affirming the Ninth Circuit in *Antoine* would seem to implicitly reverse the decision of the Sixth Circuit in this case, or at the very least, require its reconsideration.

It is respectfully requested that this Court, having already accepted *Antoine* for review, accept this case as well. Petitioners suggest that judicial economy would be served by consolidating the two cases on the merits and deciding them simultaneously, thus avoiding the possibility of conflicting results. In the alternative, this Court may wish to accept this case for review but withhold decision on one of the two cases pending a decision in the other. In any event, petitioners request that the Court

issue a writ of certiorari to the Sixth Circuit Court of Appeals to review its judgment in the instant case.

Respectfully submitted,

LEO R. WARD
Counsel of Record
SMITH R. BRITTINGHAM IV
MARK P. HERRON
WARD & ASSOCIATES,
A LEGAL PROFESSIONAL
ASSOCIATION
The Dallas Building
2217 East Ninth Street
Cleveland, Ohio 44115
(216) 241-0515

NIKI Z. SCHWARTZ
ORVILLE E. STIFEL, II
GOLD, ROTATORI, SCHWARTZ
AND GIBBONS, CO., L.P.A.
1500 Leader Building
Cleveland, Ohio 44114
(216) 696-6122

Attorneys for Petitioners